IN THE

Supreme Court of the United States

October Term, 1976

No. 76-543

IN RE: CBS LICENSING ANTITRUST LITIGATION
RECORD CLUB OF AMERICA, INC.,
Petitioner,

VS.

COLUMBIA BROADCASTING SYSTEM, INC., *et al.*,
Respondents.

IN RE: CBS LICENSING ANTITRUST LITIGATION
RECORD CLUB OF AMERICA, INC.,
Petitioner,

VS.

A & M RECORDS, *et al.*,
Respondents.

IN RE: CBS LICENSING ANTITRUST LITIGATION
RECORD CLUB OF AMERICA, INC.,
Petitioner,

VS.

KINNEY SERVICES, INC., *et al.*,
Respondents.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

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Opinions Below

The opinion of the District Court, reproduced in Appendix A, has not been officially reported; neither has the opinion of the Court of Appeals, reproduced in Appendix B.

Jurisdiction

The decision of the Court of Appeals, affirming the order of the District Court dismissing the above-entitled antitrust actions, was entered on July 2, 1976 and judgment was entered on July 2, 1976. An order dated October 6, 1976 granted an extension of time within which to file a petition for writ of certiorari to and including October 18, 1976. Jurisdiction of this Court is invoked under 28 U.S.C. §1254(1).

Questions Presented

1. Whether a district court could refuse to allow a plaintiff to respond to interrogatories by invoking the business records option outlined in Fed.R.Civ.P. Rule 33(c) ("Rule 33(c)") in the absence of an express finding: (a) that the answers to such interrogatories could not be derived from the specified business records and/or (b) that the burden of research would not be substantially the same for the party serving the interrogatories as for the party served.

2. Whether a plaintiff should be afforded relief from the consequences of a district court's refusal to allow it to utilize Rule 33(c) when: (a) such refusal was apparently based on the affidavits of two accountants (retained by a defendant) who "were unconvinced that the information called for in the interrogatories could be compiled" (16a) from those books and records of the plaintiff

they had reviewed, but who did not state that they reviewed the documents identified by plaintiff in its election under Rule 33(c), and (b) one such accountant, in conjunction with the accounting firm of which he is a partner, later compiled comparable information from those books and records of the plaintiff identified in plaintiff's election.

3. Whether in a big antitrust case huge corporate defendants should be permitted to overburden a very small corporate plaintiff with discovery requirements so burdensome and costly as to prevent the cases from ever being heard on their merits when, in accordance with its objective, Rule 33(c) could be utilized to shift the burdens of such discovery to the beneficiaries thereof.

4. Whether a district court erred in dismissing an action on the basis of the plaintiff's alleged failure to comply with discovery orders in coordinated, but not consolidated actions.

Rules and Statute Involved

Fed. R. Civ. P. Rule 33(c) provides as follows:

> "Where the answer to an interrogatory may be derived or ascertained from the business records of the party upon whom the interrogatory has been served or from an examination, audit or inspection of such business records, or from a compilation, abstract or summary based thereon, and the burden of deriving or ascertaining the answer is substantially the same for the party serving the interrogatory as for the party served, it is a sufficient answer to such interrogatory to specify the records from which the answer may be derived or ascertained and to afford to the party serving the interrogatory reasonable oppor-

tunity to examine, audit or inspect such records and to make copies, compilations, abstracts or summaries."

28 U.S.C. § 1407(a) provides, in relevant part:

"When civil actions involving one or more common questions of fact are pending in different districts, such actions may be transferred to any district for coordinated or consolidated pretrial proceedings. Such transfers shall be made by the judicial panel on multidistrict litigation authorized by this section upon its determination that transfers for such proceedings will be for the convenience of parties and witnesses and will promote the just and efficient conduct of such actions."

Fed. R. Civ. P. Rule 37(b)(2)(C) provides, in relevant part:

"(2) *Sanctions by court in which action is pending.* If a party . . . fails to obey an order to provide or permit discovery . . ., the court in which the action is pending may make such orders in regard to the failure as are just, and among others the following:

"(C) An order . . . dismissing the action or proceeding . . ."

Statement of the Cases

CBS Case

In May 1968 Petitioner ("RCOA") a small privately-owned company, filed a complaint against Columbia Broadcasting System, Inc. and a number of companies (collectively, "CBS") engaged in the distribution of phonograph records and tapes, alleging that the exclusive licenses for club use granted to Columbia Broadcasting System, Inc. by the record manufacturers violated the Sherman Act,

Clayton Act as amended by the Robinson-Patman Act, and Federal Trade Commission Act. The complaint alleged that because such licenses were exclusive, RCOA could not obtain similar licenses and was forced to purchase the same phonograph records and tapes from distributors, manufacturers and others at prices substantially higher than the cost it would have had to incur if it had obtained licenses similar to those of Columbia Broadcasting System, Inc. In November of 1970, Columbia Broadcasting Systems, Inc. signed an agreement with the F.T.C. containing an order to cease and desist from entering into or maintaining any such exclusive license agreements.

In May of 1971, CBS filed and served its initial interrogatories to RCOA requesting, among other things, detailed information regarding RCOA's costs in obtaining those records and tapes Columbia Broadcasting System, Inc. obtained under the alleged exclusive licensing arrangements ("cost interrogatories"). At first RCOA filed objections to the interrogatories in toto. However, later, in response to the Court's denial of its objections, in April of 1972 RCOA answered the interrogatories by invoking the option set forth in Rule 33(c), specifying the documents containing the answers and establishing that the burden of compiling those answers would be substantially the same by affidavit of RCOA's then Director of Auditing. On September 8, 1972, CBS moved to compel further answers to its interrogatories and on November 17, 1972, the District Court orally granted CBS's motion.

The Court had simply "rejected" RCOA's election of its option, without finding either that: (a) the answers to such interrogatories could not be derived from the specified business records or (b) that the burden of research would not be substantially the same for both parties. At the time of such rejection, the Court had the above-

described affidavit specifically representing that it was possible to "calculate the costs of records, tapes and merchandise" to RCOA *from the documents specified therein,* consisting of invoice and voucher records. The Court also had the 1971 affidavits of two accountants retained by CBS, Messrs. Gilbert and Strauss, in which, without identifying the documents they had reviewed, they stated that on the basis of *the documents they reviewed,* it was not possible to calculate such costs. They did not assert that they had reviewed RCOA's invoices and/or vouchers, the documents specified by RCOA. Furthermore, CBS did not offer any testimony of the two other accountants retained by CBS who had seen RCOA's invoices and vouchers. In addition, the Court, of course, did not know that after the submission of Mr. Strauss' affidavit, he, in conjunction with the accounting firm of which he is a partner, Prager & Fenton, would, on behalf of other record industry clients, make calculations from RCOA's books and records comparable to those Mr. Strauss swore, on behalf of CBS, he did not think could be made. (See Appendices C and D, starting at 60a.)

Thus, the District Court, which made no reference to RCOA's Rule 33(c) election in its decision, issued an order granting CBS' motion to compel answers and imposing upon RCOA the costs of providing the answers. As a result, RCOA set out to compile the "required" information. Doing so, however, proved to be the "mammoth" burden RCOA's Director of Auditing had said it would be. Gathering the information involved hiring more than forty special clerks to code information, which, to save money, was keypunched by a large, specially-hired staff in Ireland. That "discovery" project, alone, cost RCOA in excess of $100,000, exclusive of legal fees and expenses, an amount equal to approximately 10% of RCOA's tangible net worth even during its most financially healthy period.

Despite the oppressive burden, RCOA filed its answers to CBS' cost interrogatories in April of 1974. Such answers consisted of some 9,000 pages, constituting 10 volumes of computer print-outs. In June 1974 CBS objected to such answers and, consequently, in November 1974 RCOA was ordered to provide further answers in order to identify the listed phonograph records by certain prefix digits, in addition to the manufacturers' names and catalog numbers already provided, in order to distinguish monaural from stereo recordings. Thereafter, RCOA's president personally filled in the prefix digits by hand; in addition, RCOA offered to stipulate that *all* recordings could be considered as monaural or any type of sound reproduction that would be most favorable to CBS.

On December 23, 1974, drained by the more than one million dollars RCOA had spent prosecuting these antitrust cases, RCOA filed a petition for an arrangement under Chapter XI of the Bankruptcy Act. The next day, RCOA filed a motion to stay all proceedings in light of its Chapter XI filing; the motion was denied.

In January 1975 CBS moved to dismiss the complaint on the ground that RCOA had failed to comply with its discovery requests, alleging that much of the requested prefix information was either omitted (despite RCOA's offered stipulation) or erroneous and that other (non-cost) interrogatories had not been answered sufficiently. No hearing was held. Nevertheless, on May 28, 1975 the District Court issued a Memorandum and Order dismissing the antitrust action with prejudice under Rule 37(b)(2)(C).

A & M and Kinney Cases

In January 1971, the Judicial Panel on Multidistrict Litigation transferred, under 28 U.S.C. §1407, an action brought by RCOA in the United States District Court for

the Southern District of New York against a number of record manufacturers (collectively, "A & M") who had exclusive license agreements with CBS, but who were not defendants in the CBS Case. That case, the A & M Case, was based on the same allegations as the CBS Case.

In November, 1971 the Judicial Panel on Multidistrict Litigation transferred, under 28 U.S.C. §1407, an antitrust action brought by RCOA in the United States District Court for the Southern District of New York against Kinney Services, Inc. ("Kinney"). That case (the "Kinney Case"), also sought relief from violations of the Sherman Act and Clayton Act. However, unlike the allegations contained in the complaints in the CBS and A & M Cases, the Kinney Case alleges that Kinney made unlawful corporate acquisitions and thereby achieved a dominant position in the record and tape industry, and eliminated competition in the distribution of records and tapes by causing the companies it acquired to establish an exclusive distribution subsidiary in place of independent competing distributors who previously fulfilled that function.

A & M served RCOA with interrogatories which were virtually the same as CBS' cost interrogatories, except that they covered a different period. Kinney served RCOA with interrogatories which also dealt with RCOA's unit cost of acquiring records and tapes. RCOA answered the A & M and Kinney interrogatories by making available its business records containing the requested dates pursuant to Rule 33(c). As it had with respect to RCOA's exercise of its election pursuant to Rule 33(c) in the CBS Case, however, the District Court considered RCOA's answering by making its Rule 33(c) election to be no answer, stating in its opinion that, as of July of 1974, "RCOA had not even attempted to answer the interrogatories. . ." (8a).

Thus, rejecting RCOA's Rule 33(c) elections, in November of 1974, the Court ordered RCOA to make further answers with respect to cost interrogatories in the A & M and Kinney Cases, the only discovery order of significance in those cases.

On December 23, 1974, RCOA filed its Chapter XI petition.

On January 7, 1975, RCOA served further answers, on time, with respect to the Kinney Case. Although Kinney contended that the answers were inadequate, Kinney never offered any proof of such contention.

Having been given only 60 days to compile a massive data base for 1969-1973 (a period equal in size to the preceding period covered by CBS' cost interrogatories, the answers which had taken RCOA two years and cost RCOA more than $100,000 to compile), RCOA informed the Court that it lacked sufficient financial resources to answer the A & M interrogatories in a memorandum filed on February 19, 1975.

The District Court dismissed the Kinney and A & M Cases, along with the CBS Case, on the basis of RCOA's alleged willful disobedience of discovery "orders"—the one significant discovery order issued in the A & M and Kinney Cases and the prior discovery orders issued in the CBS Case.

Reasons for Granting the Writ

Rule 33(c) is still fairly new. It is important that it be interpreted and its application be established in accordance with its intended purpose.

1. *The District Court Interpreted and Applied Rule 33(c) Contrary to Its Intended Purpose.*

According to the Notes of the Advisory Committee to Rule 33(c):

> This is a new subdivision, adapted from Calif. Code Civ. Proc. § 2030(c), relating especially to interrogatories which require a party to engage in burdensome or expensive research into his own business records in order to give an answer. The subdivision gives the party an option to make the records available and place the burden of research of the party who seeks the information. "This provision, without undermining the liberal scope of interrogatory discovery, places the burden of discovery upon its potential benefitee," Louisell, Modern California Discovery, 124-125 (1963), and alleviates a problem which in the past has troubled Federal courts.

Thus, Rule 33(c) was adopted to avoid requiring a party to engage in burdensome and/or expensive research into its own business records in order to answer an interrogatory; it shifts the burden to the party who seeks the information. See 4A Moore's Federal Practice ¶37.01[6], at 37-13 to 37-19 (1975).

RCOA was obviously the type of party Rule 33(c) was intended to protect. RCOA is a small, private company involved in litigation against huge corporations that can afford top attorneys well-schooled in the sporting theory of litigation. As a result of the District Court's refusal to allow RCOA the protection of Rule 33(c), these huge corporate defendants were able to force RCOA to undertake research so costly that, even after RCOA spent an amount equal to approximately 10% of its tangible net worth trying to meet the discovery requirements imposed

upon it and was forced to file in Chapter XI, the corporate defendants still were not satisfied; they continued to claim their interrogatories had not been sufficiently answered.

Instead of allowing those giant defendant corporations to impose such an unconscionable burden on RCOA, the District Court should have considered RCOA's elections to exercise the option set forth in Rule 33(c) as sufficient answers to the cost interrogatories, as provided in such rule. However, whenever RCOA elected to exercise its option under Rule 33(c), rather than considering such election "a sufficient answer" as provided by the terms of the rule, the District Court considered it "no answer at all." (6a). Instead of interpreting and applying Rule 33(c) in accordance with its intent, without making any finding that either of the two essential factual conditions was not present, the District Court rejected RCOA's elections.

In fact, both requirements of Rule 33(c) were met and the wording of the subdivision, itself, makes it clear that as long as its conditions are met (i.e., the answers can be derived from the specified business records and the burden of research would be the same for both parties), one has a right to utilize Rule 33(c). Thus, Petitioner believes the District Court erred, for it did not make an express determination that either condition was not met, yet it rejected RCOA's exercises of its option under Rule 33(c).

The Court's rejection was of no small consequence. Not only did it force RCOA to spend in excess of $100,000 (exclusive of legal fees and expenses) in response to the CBS cost interrogatories, alone; it also directly led to the dismissal of these three antitrust actions—before they were ever heard on their merits.

2. *The Court of Appeals Has Rendered a Decision in Conflict with the Decision of Another Court of Appeals on the Same Matter.*

The Court of Appeals decision is in direct conflict with the decision of the United States Court of Appeals for the Tenth Circuit in *Daiflon, Inc.* v. *Allied Chemical Corp.*, 1976—1 Trade Cases ¶60,829 (1976). The fact situation of that case, which is directly on point, is identical to that of the cases considered herein in every material respect. Daiflon, Inc. had brought an antitrust suit against numerous corporations, had been served with a burdensome cost interrogatory, had answered by offering examination of its books and records pursuant to Rule 33(c) which answer did not satisfy the defendants, had been ordered "to answer" the interrogatory, and had tried "to answer" the interrogatory but never managed to satisfy the defendants; the case was eventually dismissed for the plaintiff's alleged failure to adequately respond to the cost interrogatory.

On appeal, the plaintiff argued the trial court had erred in finding its taking of the Rule 33(c) option was not a sufficient answer to the cost interrogatory. Unlike the Court of Appeals in the present cases, however, the Court of Appeals for the Tenth Circuit agreed (even though plaintiff would have had to further identify the relevant records, and even though the defendants argued the burden of ascertaining the information would not be the same for both parties). The Tenth Circuit held that the defendants, the interrogators, had the burden of *proving* the answer to their interrogatory was incomplete and had not done so. The Court mentioned that the extensive research in which the plaintiff had later engaged gave some substance to the plaintiff's claim that a substantially similar burden existed in compiling the answer to the cost interrogatory. The Court went on to say: "Particularly

in view of the subsequent drastic sanction imposed, we believed the trial court erred in determining appellant could not use Rule 33(c) in answering the interrogatory."

The cases at hand are identical to the Daiflon Case in all material respects—but the two Courts of Appeals rendered opposite decisions.

The question of the propriety of RCOA's use of Rule 33(c) came to the District Court via the defendants' motions to compel; the defendants did not prove RCOA's Rule 33(c) answers to the cost interrogatories were incomplete. In fact, neither Kinney nor A & M alleged that the requirements of Rule 33(c) were not met with respect to their cost interrogatories. Furthermore, although CBS alleged the information it requested could not be compiled from the records RCOA specified, the "evidence" it offered consisted of the affidavits described under "Statement of the Cases," supra, which affidavits did not relate to the specified documents; thus, CBS did not prove the requirements were not met.

On the other hand, RCOA's Director of Auditing testified that both conditions were met. Furthermore, the large sum later expended by RCOA in its attempts to satisfy the trial court's discovery orders substantiates the testimony that the cost of research would be the same to the corporate defendants as to RCOA. In addition, the fact that one of CBS' affiants, in conjunction with his accounting firm, later compiled information comparable to that called for by CBS' cost interrogatories from RCOA's financial data in order to support claims made by its clients against RCOA (Appendices C and D, starting at 60a) certainly indicates that such information could be compiled from RCOA's books and records (as does the fact that RCOA was able to compile such information therefrom).

The cases at hand are identical to the Daiflon Case in all material respects; the Courts of Appeals' decisions should have also been identical.

3. *The Court of Appeals Rendered a Decision Which Would Frustrate the Congressional Purpose in Providing for Private Antitrust Litigation.*

The Sherman and Clayton Acts specifically provide for private litigation thereunder, clearly indicating that Congress intended to give private parties the right to protect themselves from violators of those antitrust laws.

That right becomes worse than meaningless, however, if the courts do not help the small plaintiffs, as they try to protect themselves against giant antitrust violators, by affording such litigants the protections provided by law, including the protection encompassed in Rule 33(c). Unless such protections are afforded small plaintiffs, large corporate defendants, employing the sporting theory of litigation, can make a mockery of private antitrust actions, winning such actions by attrition before they go to trial, using the antitrust laws to destroy those who try to protect themselves by bringing private antitrust actions.

RCOA, a small privately-owned company, instituted the antitrust actions at hand in order to protect itself against huge antitrust violators. The cases have never been heard on their merits. After years of litigation, and an investment in excess of one million dollars by RCOA in such litigation, essentially all that has happened is that RCOA, denied the protection of Rule 33(c), has been exhausted by oppressive interrogatories and endless demands for minutiae. Thus, contrary to Congressional intent, RCOA's right to bring private actions under the antitrust laws has not protected RCOA.

The Court of Appeals decision in these cases will not encourage others to seek the protection of the antitrust laws through private litigation. It will, in effect, preclude such private litigation, regardless of the merits of particular complaints, for, at this time, the cases at hand stand for the proposition that (especially in big antitrust cases) "might makes right"; merit is irrelevant, for if you don't start out big enough, your case will never be heard on the merits—your opponents will make sure you run out of money first.

Rule 33(c) was adopted to protect parties like RCOA, parties who cannot afford the costs of meeting endless discovery demands. The District Court was wrong to deny RCOA Rule 33(c)'s protection. To deny small litigants such protections is to deny them their right to protect themselves against antitrust violators.

4. *The Court of Appeals Rendered a Decision Which Violates Plaintiff's Rights to Due Process of Law.*

Although the Kinney Case, like the CBS and A & M Cases, is an antitrust case, as described under "Statement of the Cases" above, the Kinney Case is based upon allegations entirely different from those upon which the CBS and A & M Cases are based. Nevertheless, the District Court hopelessly confused the Kinney Case with the CBS and A & M Cases. Having confused them, as indicated by the District Court and Court of Appeals opinions, the District Court dismissed the Kinney Case because it concluded RCOA had failed to answer interrogatories propounded in the CBS Case in May of 1971—six months prior to the commencement of the Kinney Case! Yet no order of the Multidistrict Panel that transferred the Kinney Case pursuant to 28 U.S.C. § 1407(a), or of the District Court, ever made all prior discovery orders in the CBS and/or A & M Cases applicable to the Kinney Case.

Furthermore, the Multidistrict Panel's order transferring the Kinney Case for pretrial proceedings with the CBS and A & M Cases did not consolidate their pretrial proceedings, and the District Court never entered an order consolidating the pretrial proceedings in those three separate actions. Therefore, the conduct of RCOA in the CBS and A & M Cases could not properly be the basis for dismissal of the Kinney Case.* See *Southern Railway Co.* v. *Templar,* 463 F.2d 97 (10th Cir. 1972) and *In re U.S. Financial Litigation,* 64 F.R.D. 76 (S.D. Cal. 1974).

As stated in the Court of Appeals decision, "only one discovery order of significance to the ruling on dismissal, dated November 1, 1974, was issued in the A & M and Kinney cases" (55a). Although, due to financial difficulties, RCOA did not comply with that order with respect to the A & M Case, RCOA did comply with that order, on time, with respect to the Kinney Case. (Kinney claimed RCOA's response was inadequate, but Kinney never offered any proof of such contention). Thus, dismissal of the Kinney Case under Rule 37(b)(2)(c), or otherwise, was inappropriate.

Even if the District Court had considered the issue of the adequacy of RCOA's response to the November 1, 1974 order with respect to the Kinney Case and found the response inadequate, in light of RCOA's history of timeliness and cooperation with respect to discovery in the Kinney Case, dismissal of the case would have been obviously inappropriate. As indicated in the Court of Appeals decision, the District Court, however, dismissed the Kinney

* Even consolidation, had it been ordered, would "not merge the suits into a single cause or change the rights of the parties, or make those who are parties in one suit parties in another." *Johnson* v. *Manhattan Ry. Co.*, 289 U.S. 479, 496-97 (1933); *Katz* v. *Realty Equities Corp.*, 521 F.2d 1354, 1358 (2d Cir. 1975); *Greenberg* v. *Giannini,* 140 F.2d 550, 552 (2d Cir. 1944).

Case as punishment for RCOA's alleged conduct in the CBS case.

The imposition of a penalty, as punishment for conduct in another case, violates a litigant's rights to Due Process of Law. As stated by the Fifth Circuit, Rule 37:

> "was designed to empower the court to compel production of evidence by imposition of reasonable sanctions. The court, however, should not go beyond the necessities of the situation to foreclose the merits of controversies as punishment for general misbehavior." *Dorsey* v. *Academy Moving & Storage, Inc.*, 423 F.2d 858, 860-61 (5th Cir. 1970).

See also Mitchell v. *Johnson,* 274 F.2d 394 (5th Cir. 1960); 4A Moore's Federal Practice ¶37.03[2.1] at pp. 37-56 (1975).

The District Court was clearly erroneous in concluding that the Kinney Case should be dismissed because of RCOA's claimed failure to comply with discovery orders in the coordinated actions.

CONCLUSION

For all of the foregoing reasons, petitioner respectfully requests that this Court grant this petition.

Respectfully submitted,

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APPENDICES

Appendix A

Memorandum and Order

IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF PENNSYLVANIA
MDL DOCKET NO. 59

IN RE:
CBS LICENSING ANTITRUST LITIGATION

CIVIL ACTION NO. 68-1132
RECORD CLUB OF AMERICA, INC.,

v.

COLUMBIA BROADCASTING SYSTEM, INC.

CIVIL ACTION NO. 71-220
(70 Civ. 2320 S.D.N.Y.)
RECORD CLUB OF AMERICA, INC.,

v.

A & M RECORDS, ET AL.

CIVIL ACTION NO. 72-819
(71 Civ. 5096 S.D.N.Y.)
RECORD CLUB OF AMERICA, INC.,

v.

KINNEY SERVICES, INC., ET AL.

Memorandum and Order

TROUTMAN, J. MAY 20, 1975

This matter comes before the Court on the motions by defendants[1] under Rules 37 and 41, F.R.Civ.P.,[2] to dismiss the actions by reason of the failure of plaintiff, Record Club of America, Inc. (RCOA) to answer interrogatories. This is the fourth time in this action that CBS has moved for a dismissal for failure of RCOA to answer interrogatories. On two prior occasions the Court denied the motions, without prejudice to their renewal in the event of noncompliance and on one occasion the motion to dismiss

[1] Columbia Broadcasting System, Inc. (CBS), A & M Records, Inc., Herb Alpert, Jerome Moss, Caedman Records, Inc., Elektra Corporation, Elektra Sales Corporation, Kinney Services, Inc., and Warner-Elektra-Atlantic Distributing Corp.

[2] Rule 37 of the Federal Rules of Civil Procedure provides, in part:

"Failure to Make Discovery: Sanctions

• • •

"(b) Failure to comply with order.

• • •

"(2) Sanctions by court in which action is pending. If a party or an officer, director, or managing agent of a party or a person designated under Rule 30(b)(6) or 31(a) to testify on behalf of a party fails to obey an order to provide or permit discovery, including an order made under subdivision (a) of this rule or Rule 35, the court in which the action is pending may make such orders in regard to the failure as are just, and among others the following:

• • •

"(C) An order striking out pleadings or parts thereof, or staying further proceedings until the order is obeyed, or dismissing the action or proceeding or any part thereof, or rendering a judgment by default against the disobedient party; • • •"

Rule 41(b) provides:

"(b) Involuntary Dismissal: Effect thereof. For failure of the plaintiff to prosecute or to comply with these rules or any order of court, a defendant may move for dismissal of an action or of any claim against him."

Memorandum and Order

was withdrawn when RCOA at long last supplied certain limited data shortly after the motion was filed.

As more fully appears in this opinion, the Court has given every conceivable latitude to RCOA in an effort to defer and ultimately avoid the severe sanction of dismissal. However, RCOA's disdainful attitude toward the Court's orders, its interminable delay in providing any answers to relevant interrogatories, and its failure to answer fully and completely those interrogatories when it finally chose to act, compel the Court now to grant defendants' motions.

The Court is not unaware of the severity of the sanction, but RCOA has been repeatedly warned that its continued refusal to comply with the Court's orders would inevitably lead to dismissal. We suspect that RCOA's treatment of the repeated orders of this Court is without precedent.

HISTORY OF THE LITIGATION

RCOA began this action or series of actions on May 29, 1968, when it filed a complaint against CBS and a host of phonograph record manufacturers alleging that the exclusive licenses of phonograph records and tapes for club use granted to CBS by the record manufacturers were violative of Sections 1 and 2 of the Sherman Act, 15 U.S.C. §§1 and 2, Section 2(a) of the Clayton Act, as amended by the Robinson-Patman Act, 15 U.S.C. §13(a), and Section 5 of the Federal Trade Commission Act, 15 U.S.C. §45.[3]

RCOA claimed in its complaint, and has alleged throughout the tortuous course of this protracted litigation, that

[3] The Court subsequently dismissed the counts of RCOA's complaint alleging violations of Section 5 of the FTC Act and Section 2(a) of the Robinson-Patman Act. *Record Club of America, Inc.* v. *Columbia Broadcasting System*, 310 F. Supp. 1241 (E.D. Pa. 1970).

because the licenses for club use between CBS and record manufacturers were exclusive, RCOA was unable to obtain similar licenses. As a result, RCOA claimed it was required to purchase the same phonograph records and tapes from distributors, manufacturers and others at prices higher than the cost it would have had to incur if it had obtained licenses similar to those of CBS. Thus, RCOA relies on its alleged higher costs in obtaining finished phonograph records from distributors and others, first to establish the *fact* that it was injured by the exclusive licenses held by CBS and, secondly, to establish the *measure* of its alleged damages.

On January 20, 1971, the Judicial Panel on Multidistrict Litigation transferred, under 28 U.S.C. §1407, an action brought by RCOA in the United States District Court for the Southern District of New York against a number of record manufacturers who had exclusive license agreements with CBS, but who were not defendants in the CBS case pending in Philadelphia.[4] That case was entitled *Record Club of America, Inc.* v. *A & M Records, et al.* On April 19, 1972, a third case brought by RCOA in the Southern District of New York, this against Kinney Services, Inc., and its distribution subsidiary, Warner-Elektra-Atlantic Distributing Corporation, was similarly transferred for coordination with the CBS and A & M cases.[5]

Like the CBS case, the A & M and Kinney cases involve the contention that, because of the exclusive licenses held by CBS, RCOA's cost of acquiring the same phonograph

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[4] *In re CBS Licensing Antitrust Litigation*, 328 F. Supp. 511 (JPML 1971).

[5] *In re CBS Licensing Antitrust Litigation*, 342 F. Supp. 1177 (JPML 1972).

records and tapes as CBS, was higher than would have been the case had RCOA been granted similar licenses.

On May 19, 1971, three years after the institution of this litigation, CBS filed and served its Initial Interrogatories addressed to RCOA. Thus, RCOA was not rushed. The interrogatories requested, among other things, detailed information regarding RCOA's cost of obtaining records and tapes (Interrogatories 1, 2 and 23) under the license agreements it did have (Interrogatory 4), and the conspiracy alleged by RCOA (Interrogatories 13, 14 and 15). RCOA objected to each interrogatory on sundry grounds, but with respect to what have come to be known as the "cost interrogatories" RCOA stated that the information requested was contained in documents which had been produced by RCOA and examined by CBS over an extended period of time.

On September 3, 1971, CBS moved to compel answers to all of its interrogatories and filed supporting affidavits of Richard E. Gilbert and Leo Strauss, two accountants retained by CBS, who had examined RCOA's documents and who stated, under oath, that the documents produced did not contain information from which complete answers to CBS's cost interrogatories could be obtained or compiled. In response, RCOA sought to shift the burden, stating that it was possible to compile the necessary information from the documents produced. It made no effort to compile the information and thus expedite the litigation. Its efforts were devoted to delaying rather than expediting discovery.

After oral argument, the Court, on October 22, 1971, entered an order granting CBS's motion to compel and directing RCOA to answer all interrogatories.

Memorandum and Order

On May 19, 1972, one year after CBS had filed its initial interrogatories and seven months after the Court had directed RCOA to answer, RCOA filed its "answers", which were in large measure no answers at all. As an example of their inadequacy, with respect to the cost interrogatories, RCOA simply made reference to certain kinds of documents and again invited CBS to inspect, audit or copy such documents so that CBS might glean the answers and thus compile its own information subject to RCOA's different interpretation and subsequent attack. In other words, RCOA was attempting to resurrect its original objection to answering the cost interrogatories, a matter the Court had resolved, it thought, on October 22, 1971. RCOA furnished no answers to the conspiracy interrogatories, and no answers to the so-called "damage interrogatories" (Interrogatories 16 and 17), stating that answers would be provided after discovery.

Thereafter on September 8, 1972, CBS again moved to compel answers to most of its interrogatories,[6] but also requested the Court to dismiss the action under Rules 37 and 41 F.R.Civ.P. because of RCOA's failure to answer the interrogatories. This motion was joined in by defendants in the A & M and Kinney cases as well.

At this point in the proceedings, almost four and one-half years after the institution of the CBS action and one year after the Court had directed RCOA to supply answers, the Court would have been fully justified, we think, in dismissing the action. RCOA had simply ignored the order of October 22, 1971, and offered no excuse for noncompliance. Without answers to CBS's cost, damage or conspiracy interrogatories, defendants were unable to conduct meaning-

[6] 1, 2(i-xi), 4(viii, ix, xiia-e, xiii-xiv, xvi, xvii, xix, xx, xxii-xxiv), 5, 6, 9, 11, 13 through 15, 16, 17, 19, 20, 23, 24, 25, 27, 30 and 31.

Memorandum and Order

ful discovery by oral depositions or otherwise and were obviously prejudiced in their preparation for trial. Moreover, RCOA's unwillingness to answer created grave doubts as to whether RCOA could support at trial the contention, central to its case on both liability and damages, that because of the exclusive licenses held by CBS, RCOA was forced to obtain finished records and tapes at a cost higher than CBS's costs for records and tapes, thus allegedly putting RCOA to a competitive disadvantage in the record club business.

Nonetheless, after again hearing argument on the matter, the Court, on November 17, 1972, issued an order granting CBS's motion to compel answers and imposing upon RCOA the cost of providing the answers. The Court, in what could be considered judicial largess, denied defendants' motions to dismiss, "without prejudice to [their] renewal in the event of non-compliance with the order heretofore entered" (Tr. pp. 221-222). To keep the Court informed and to stimulate RCOA's interest, the Court also directed RCOA, because it was familiar with all three cases, to submit monthly status reports on the progress of the coordinated litigation.

For the next year and a half, nothing was done by RCOA to advance its cause. Although counsel for RCOA periodically reported on the status of the preparation of answers to CBS's interrogatories, RCOA's projected completion date was continually pushed back as a result of which, on March 27, 1974, CBS again moved to dismiss. On April 2, 1974, RCOA belatedly filed answers to CBS's "non-cost interrogatories" and on April 8, 1974, RCOA filed answers to the cost interrogatories, the latter of which consisted of volumes of computer print-outs, which purportedly contained the answers to CBS's interrogatories.

On June 25, 1974, CBS withdrew its motion to dismiss and substituted a motion to compel further answers, or in the alternative for an order dismissing the action or precluding the introduction of evidence.[7]

On July 25, 1974, defendants in the A & M and Kinney cases also filed a motion to dismiss or in the alternative to compel answers to interrogatories filed by defendant in those cases.[8] Up to that time RCOA had not even attempted to answer the interrogatories that were the subject of those defendants' motions. In response to interrogatories in the A & M case, RCOA stated that the answers could be derived from certain documents which would be made available for defendant's inspection. In the Kinney cases, RCOA's response to the interrogatories that were filed in January, 1973, one and one-half years prior thereto, was that RCOA was in the process of compiling a "summary" and "analysis" to supplement its answers.

After hearing argument for three days, one day of which was devoted entirely to the testimony of various individuals including the President of RCOA, regarding the adequacy of RCOA's answers to the cost interrogatories,[9] the Court

[7] CBS moved with regard to Interrogatories 1, 2(viii, ix, x, xi), 4(viii, ix, xii(a-e), xiii, xiv, xvi, xix, xx, xxii, xxiii, xxiv), 5, 6, 9, 23(v) and 24.

[8] In the A & M case, defendants moved with respect to Interrogatories 1, 2, 3, 4 and 5 of Set No. 3, which were virtually the same as CBS's cost interrogatories, except they covered the period 1970 through 1973. In the Kinney case, defendants moved with respect to Interrogatories 16(g), 16(i) and 35(d) of Set No. 1, which, again, dealt with RCOA's unit costs of acquiring records and tapes.

[9] The testimony on this point, contained in the transcript of August 2, 1974, conclusively demonstrates that the volumes of computer print-outs did not provide adequate identification of the phonograph records acquired by RCOA. It was thus impossible for defendants to determine RCOA's costs of acquisition. (Tr. pp. 111-112, 119-121, 192, 199-200, 211, 219, 222, 294-296). Sigmund W. Friedman, the President of RCOA, testified at that time that he was unaware that the Court had entered two orders directing RCOA to answer the interrogatories (Tr. pp. 291-292).

found that the answers provided by RCOA to the cost interrogatories (1, 2 and 23) and to the other interrogatories were inadequate. On November 1, 1974, the Court for the third time granted the motion to compel and ordered RCOA to answer CBS's interrogatories within 30 days, and for the second time denied defendants' motions to dismiss, without prejudice.

The Court also denied without prejudice defendants' motion to dismiss in the A & M and Kinney cases, but directed RCOA to answer within 60 days Interrogatories 1 through 5 in the A & M case and Interrogatories 16(g), 16(i) and 35(d) in the Kinney case.

On December 5, 1974, RCOA filed "Plaintiff's Further Answers to Certain CBS' Interrogatories". In response to the cost interrogatories, RCOA referred to 10 volumes of computer print-outs which were lodged with the Clerk, but copies of which were not supplied to CBS or its counsel. The Court subsequently required RCOA to furnish a copy for CBS, but to date this has not been done.[10]

On December 24, 1974, RCOA filed a motion to stay all proceedings in these cases on the grounds that it did "not now have sufficient financial resources to prosecute the above-captioned actions" (Degling Affidavit dated January 15, 1975). In support of that motion, RCOA attached a copy of a petition for arrangement under Chapter XI of the Bankruptcy Act which RCOA had filed in the United

[10] As recently as March 3, 1975, and during the pendency of the present motions to dismiss, RCOA has offered to supply such copy. In the meantime, however, CBS has examined the original of the computer print-out filed in the Clerk's office and found it wanting.

States District Court for the Middle District of Pennsylvania on December 23, 1974. The motion for a stay was denied. RCOA had also requested an extension of one week to file its answers in the Kinney case.

On January 24 and 30, 1975, defendants filed the motions to dismiss which are now before the Court. Defendants claim that RCOA has failed to supply full and complete answers to CBS's Interrogatories 1(iv), 1(xiv), 1(xxi), 1(xxii), 2(viii), 2(ix), 2(x), 2(xi), 4(viii), 4(ix), 4(xii), 4(xiv), 4(xvi), 4(xxiv) and 24. In addition, CBS asserts that the answers provided by RCOA to Interrogatories 1 and a(i)-2(xi) are inaccurate and deficient. As noted, a copy of the answers to Interrogatories 1 and 2(i)-2(xi) were not served upon CBS and CBS's position is based upon an examination of the computer print-out filed with the Clerk (Thurlby Affidavit filed on January 24, 1975).

In the A & M case, no answers were filed by RCOA as required by the order of November 1, 1974, and in the Kinney case, defendants contend the answers are inadequate on their face.

RCOA has, in opposition to CBS's motion to dismiss, admitted its failure to provide further answers to Interrogatories 2(viii), 2(x), 4(viii), 4(ix), and 4(xxi), as required by the Court's order, but now states that it "lacks sufficient present resources to answer the remaining interrogatories in whole or in part" (RCOA Memorandum, p. 2, n. 2, Degling Affidavit filed February 19, 1975, ¶¶2-14). In the A & M case, RCOA states that it lacks sufficient financial resources to answer defendants' interrogatories in any fashion (RCOA Memorandum, p. 2, Degling Affidavit filed February 19, 1975, ¶15). RCOA prefaces its answers in the Kinney case by stating: "Plaintiff is unable at this time to supplement fully the indicated interrogatories

within the time frame of December 30, 1974, extended to January 7, 1975, by further order of the Court."

The Court finds that defendants' interrogatories are relevant, if not central, to RCOA's claims of liability and damages; that to the extent RCOA has answered at all, the answers provided by RCOA are inadequate and unresponsive; that there exists no valid excuse, in a case pending almost seven years, for RCOA's continued failure, over a period of almost four years, to answer fully and completely, that RCOA has willfully disobeyed the orders of the Court requiring answers; and that dismissal of this seven-year-old litigation is not only justified, but compelled under the circumstances.

Discussion

We recognize the cardinal principle that dismissal, being the severest of sanctions, is to be most sparingly used. The sanction of dismissal, though its imposition is committed to our discretion, is one which should not be invoked "precipitately or rashly". *DiGregorio* v. *First Rediscount Corp.*, 506 F. 2d 781, 788 (3d Cir. 1974). In *DiGregorio* the Court of Appeals stated:

> "Because dismissal is the most severe sanction available to a district court under Rule 37, we are ever reluctant to affirm its invocation." [*Id.* at 788]

In the light of the history of this case, we have certainly not acted "precipitately or rashly".

We are acutely aware that the sanction of dismissal is permanent and fatal to RCOA's claim and that it must always be "tempered by the careful exercise of judicial discretion to assure that its imposition is merited." *Trans World Airlines* v. *Hughes*, 322 F. 2d 602, 614 (2d Cir.

1964). Mindful of these cautions, the Court has, in the exercise of discretion, repeatedly and patiently denied the various motions to dismiss previously filed in these actions, time after time giving RCOA additional opportunity to comply with the outstanding discovery orders.

On the other hand, it is noted that dismissals pursuant to Rule 37 have been upheld in circumstances far less egregious than those involved here. *Norman* v. *Young*, 422 F. 2d 470 (10th Cir. 1970); *Diapulse Corp. of America* v. *Curtis Publishing Co.*, 374 F. 2d 442 (2d Cir. 1967); *Von Der Heydt* v. *Kennedy*, 299 F. 2d 459 (D.C. Cir. 1962), *cert. denied*, 370 U.S. 916 (1962); *Brookdale Mill* v. *Rowley*, 218 F. 2d 728 (6th Cir. 1954); *United States ex rel. Weston & Brooker Co.* v. *Continental Casualty Co.*, 303 F. 2d 91 (4th Cir. 1962).

It is well recognized, and the reason therefor is amply demonstrated in these cases, that dismissal for failure to provide adequate discovery "is particularly appropriate in complex antitrust litigation like that now before the Court where efficient and effective discovery procedures are essential to orderly adjudication." *Philadelphia Housing Authority* v. *American Radio & Standard Sanitary Corp.*, 50 F.R.D. 13, 19 (E.D. Pa. 1970); *aff'd sub nom. Mangano* v. *American Radio & Standard Sanitary Corp.*, 438 F. 2d 1187 (3d Cir. 1971); *Trans World Airlines, Inc.* v. *Hughes*, 332 F. 2d 602, 615 (2d Cir. 1964); *In re Professional Hockey Antitrust Litigation*, 63 F.R.D. 641 (E.D. Pa. 1974), appeal pending.

As Judge Higginbotham said in *In re Professional Hockey Antitrust Litigation, supra*, at 656:

> "If the discovery process is abused or allowed to be frustrated by the parties, then the entire pretrial procedures and the discovery provisions of the Federal Rules of Civil Procedure can be turned into a mockery. • • • Sanctions become meaningless unless they are applied when the circumstances demand them, though harsh they may be."

In the *Professional Hockey* case, it appears that plaintiffs had also failed to answer interrogatories relating to the nature and amount of their alleged damages, although, in contrast, there only seventeen months had passed after the filing of the interrogatories. Here, RCOA has had nearly four years to file adequate answers, and to comply with the repeated and outstanding orders of this Court. RCOA has repeatedly benefited by the Court's patience, but in so doing has frustrated the orderly progress of the judicial process and has finally brought upon itself the extreme consequence of dismissal.

The burdens imposed upon the defendants' resources during the intervening years, the repeated hearings before the Court, the continued arguments over substantially the same or similar issues in discovery, the repeated assurances of future compliance, followed by continued failure or refusal to comply, the continued use or misuse of judicial time and resources and the undesirable congestion of court calendars and dockets compel the conclusion here reached.

RCOA contends initially (pp. 5-11 of RCOA's Memorandum in Opposition to Motion to Dismiss) that its answers are sufficient to show that RCOA will be able to sustain its burden of proof at trial with respect to its measure of damages, and that, therefore, the answers provided are not deficient. RCOA, however, has failed to meet defendants' assertion that, in order to sustain its burden

of proving that the exclusive licenses *caused* injury, RCOA must show that its cost of acquiring finished records was higher than would have been the case had RCOA been able to obtain records pursuant to licenses. This burden necessarily involves a comparison between RCOA's true cost of obtaining records and CBS's cost for obtaining the same records. Notwithstanding years of litigation and days of argument and/or hearing, we have been unable to reach the point of comparison.

It is, moreover, undisputed by RCOA that the information sought is relevant and is necessary for *defendants* to prepare for trial. *Cf. Nagler* v. *Admiral Corporation,* 167 F. Supp. 413, 416 (S.D.N.Y. 1958); *Kainz* v. *Anheuser-Busch,* 15 F.R.D. 242, 249 (N.D. Ill. 1954). Although RCOA argues that it suffices to introduce at trial evidence only of RCOA's aggregate costs of obtaining unspecified records, defendants certainly have a basic interest in developing and presenting and the right to develop and present to a jury accurate facts surrounding the question whether the phonograph records obtained by RCOA were the same records CBS allegedly obtained at a lower price by license. RCOA's answers are wholly insufficient to provide that crucial information following literally years of discovery litigation.

RCOA next contends that dismissal of the action for failure to answer interrogatories or provide discovery, although so ordered three times over a forty-two-month period, is inappropriate when the failure results from inability, rather than willfulness or bad faith. Although no case is cited which holds that financial inability is an excuse for non-compliance, RCOA relies on *Societe Internationale* v. *Rogers,* 357 U.S. 197 (1958). In that case, the leading Supreme Court opinion construing Rule 37, the

plaintiff, had it complied with the order of the district court requiring production of documents, would have subjected itself to criminal sanctions in Switzerland, where it was incorporated. The Court stated (357 U.S. at 212):

> "• • • we think that Rule 37 should not be construed to authorize dismissal of this complaint because of petitioner's noncompliance with a production order when it has been established that failure to comply has been due to inability, *and not to willfulness, bad faith, or any fault of petitioner.*" (Emphasis added)

RCOA's non-compliance does not come within the limiting language of the Supreme Court in *Societe Internationale.* Its "fault" is clearly evident on this record.

Were this the first time RCOA's failure had come before the Court, RCOA's financial condition might conceivably have a bearing upon the scope of any order requiring answers. It would not serve, however, to excuse a plaintiff from providing any information at all. However, on this record of repeated disobedience to the Court's orders and prolonged delay in providing any responsive information during a long period involving no financial distress, RCOA's present and most recent financial condition cannot excuse its continuing non-compliance. It is abundantly clear to the Court that RCOA is solely responsible for the position in which it now finds itself.[11] At no time before the entry

[11] RCOA claims that it must be afforded a hearing with respect to its purported inability to answer the interrogatories to accord with due process of law (RCOA Memorandum n. 5). The Court has on at least three occasions given RCOA a full hearing regarding its failure to answer these interrogatories, including a day of testimony on August 27, 1974. "Due process" has already led us down this long trail of briefs, reply briefs, supplemental briefs, affidavits, reply affidavits, oral argument hearings, testimony and

of the Court's orders of October 22, 1971, November 17, 1972, and November 1, 1974, did RCOA suggest that it was unable for any reason to answer the interrogatories. On the contrary, RCOA's consistent position has been that the information could be and would be obtained from its books and records, and that it was simply a matter of undertaking the task of compiling the data, a burden RCOA had initially attempted to place on defendants.

Under these circumstances, the conclusion that RCOA's financial inability does not excuse non-compliance is compelled by the Supreme Court's construction of *Societe Internationale* in *Link* v. *Wabash R. R.*, 380 U.S. 626 (1962). In *Link*, the district court dismissed, without notice or hearing, a personal injury action because petitioner's attorney failed to appear for a scheduled pre-trial conference, his only failure to comply with a court order. The Supreme Court sustained the dismissal pointing out that "there is nothing in the record before us to indicate that counsel's failure to attend the pretrial conference was other than deliberate or the product of neglect." The Supreme Court held that (370 U.S. at 636):

> "* * * this is not a case in which failure to comply with a court order 'was due to inability fostered neither by * * * [petitioner's] own conduct nor by circumstances within its control.' *Societe Internationale* v. *Rogers*, 357 U.S. 197, 211."

This case falls squarely within the holding of the Court of Appeals in *DiGregorio* v. *First Rediscount Corp.*, 506

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counter-testimony. Indeed, considering the burdens, financial and otherwise, which that long journey has placed upon the defendants, "due process" and the cause of justice dictate that *that* trail shall end here.

F. 2d 781 (3d Cir. 1974). There, the Court of Appeals affirmed dismissal of a wrongful death action because of plaintiff's failure to answer interrogatories, even though the district court had made no specific finding of willfulness and despite the fact that plaintiff claimed she was unable to answer the interrogatories. The Court of Appeals perceived "a pattern of conduct in flagrant disregard both of the general rules of discovery and of a specific court order" and found that willfulness was "mirrored in the record". 506 F. 2d at 788. A similar pattern of conduct by RCOA is evident on this record.

The Court finds that RCOA's present inability, if such it be, to answer defendants' interrogatories is due solely to RCOA's past willful disregard for the orders of this Court. RCOA's present state of insolvency cannot excuse non-compliance with the order originally entered October 22, 1971, reiterated thirteen months later on November 17, 1972, and once more directed two years later on November 1, 1974. To hold otherwise would countenance a contumacious course of conduct which has already delayed the resolution of this litigation beyond all reasonable bounds and would further, irretrievably prejudice defendants in their defense of the action. RCOA's legal position is not the result of its present or recent financial condition. It is the result of its continued refusal or neglect to meet the burden of discovery properly resting upon it in litigation voluntarily instituted by it. RCOA has never been obligated to involuntarily assume the burdens placed upon the defendants in this protracted and complex litigation. It has long sought to frustrate the defendants in discovery properly sought by them. The cause of these long-suffering defendants cries out for the relief afforded by the Rules of Civil Procedure.

Memorandum and Order

Accordingly, the Court is thus compelled to grant defendants' motions and to dismiss the actions with prejudice pursuant to Rule 37(b)(2)(C) of the Federal Rules of Civil Procedure. The foregoing shall constitute the findings of fact and conclusions of law required by F.R.Civ.P. 52(a).

Appendix B

Opinion of the Court

(Filed July 2, 1976)

UNITED STATES COURT OF APPEALS

FOR THE THIRD CIRCUIT

Nos. 75-1812, 75-2001 & 75-2002

IN RE:

CBS LICENSING ANTITRUST LITIGATION

Record Club of America, Inc.,

Appellant.

(D. C. MDL No. 59)

APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF PENNSYLVANIA

Argued March 8, 1976

Before KALODNER, VAN DUSEN and WEIS,
Circuit Judges

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VAN DUSEN, *Circuit Judge.*

The appeals at Nos. 75-2001 (the "CBS" case) and 75-2002 (the "A & M" case) challenge a May 20, 1975, district court order[1] dismissing, with prejudice, two coordi-

[1] The May 20, 1975, dismissal order is reproduced at 2577a. The MEMORANDUM in support of the order appears at 2559a-2576a.

nated civil actions[2] claiming damages for violations of antitrust and trade regulation laws, for failure to comply with orders to answer interrogatories. The appeal at No. 75-1812 (the "Kinney" case) challenges the same May 20, 1975, district court order, which also dismissed another coordinated civil antitrust and trade regulation action for the same reason.[3]

The May 20, 1975, order granted motions to dismiss pursuant to F. R. Civ. P. 37(b)(2)(C) and 41(b).[4] We affirm that order.

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[2] Civil No. 68,1132, E. D. Pa. (Record Club of America, Inc. v. Columbia Broadcasting System, Inc., et al.), subject to the appeal at No. 75-2001, and Civil No. 71-220, E. D. Pa., being Civil No. 70-2320, S. D. N. Y. (Record Club of America, Inc. v. A & M Records, et al.), subject to the appeal at No. 75-2002. Civil No. 70-2320, S. D. N. Y., was transferred to the Eastern District of Pennsylvania in 1971 for coordinated pretrial proceedings with Civil No. 68-1132 by the Judicial Panel on Multi-District Litigation (D. C. MDL No. 59). See 28 U. S. C. § 1407.

[3] This action was commenced in S. D. N. Y. as 71 Civil 5096 and transferred to E. D. Pa. in April 1972, where it was docketed as Civil No. 72-819 (Record Club of America, Inc. v. Kinney Services, Inc., et al.).

[4] F. R. Civ. P. 37(b)(2)(C) provides, *inter alia:*

"(b) Failure to comply with order.

* * *

"(2) Sanctions by court in which action is pending. If a party or an officer, director, or managing agent of a party or a person designated under Rule 30(b)(6) or 31(a) to testify on behalf of a party fails to obey an order to provide or permit discovery, including an order made under subdivision (a) of this rule or Rule 35, the court in which the action is pending may make such orders in regard to the failure as are just, and among others the following:

"(C) An order striking out pleadings or parts thereof, or staying further proceedings until the order is obeyed, or dismissing the action or proceeding or any part thereof, or rendering a judgment by default against the disobedient party; . . . ."

I. *The CBS Case (No. 75-2001)*

In the CBS case the district court had denied similar motions, without prejudice to their renewal, on two previous occasions.

In May 1968, the Record Club of America, Inc. (RCOA) filed a complaint against the Columbia Broadcasting System, Inc. (CBS) and a number of companies engaged in the manufacture and distribution of phonograph records and tapes,[5] alleging five counts of antitrust and trade regulation violations beginning in 1961. A sixth count was later added.[6] According to the complaint, the alleged violations

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F. R. Civ. P. 41(b) provides:

"(b) Involuntary Dismissal: Effect thereof. For failure of the plaintiff to prosecute or to comply with these rules or any order of court, a defendant may move for dismissal of an action or of any claim against him."

[5] Columbia Records Distributing Corp.; Herb Alpert, as partner in A & M Records; Jerome Moss, as partner in A & M Records; A & M Records; A & M General Corp.; Irving Music, Inc.; Consolidated Electronics Industries Corp.; Mercury Record Productions, Inc.; Mercury Record Manufacturing Co., Inc.; Mercury Record Corp.; Motown Record Corp.; Vanguard Recording Society, Inc.; Vanguard Record Sales Corp.; Vanguard Stereolab, Inc.; Warner Bros. Pictures Corp.; Warner Bros. Records, Inc.; Warner Bros. Records Sales Corp. Only CBS and the Warner defendants remain in this appeal.

[6] The original and amended complaint alleged the following violations:

Count I—Restraint of Trade, Sections 1 and 3 of the Sherman Act, 15 U. S. C. §§ 1 and 3; Count II—Attempt to Monopolize, Monopolization, and Conspiracy to Monopolize, Section 2 of the Sherman Act, 15 U. S. C. § 2; Count III—Asset Acquisitions, Section 7 of the Clayton Act, 15 U. S. C. § 18; Counts IV and VI—Discrimination, Sections 2(a) and 2(f) of the Robinson-Patman Act, 15

arose from certain exclusive licenses granted CBS by the manufacturers for purposes of marketing records and tapes through its mail order operations. As a result, RCOA claimed it was forced to purchase similar records and tapes from distributors, manufacturers and others at *costs* higher than those incurred under CBS licenses.

All defendants moved to dismiss Count V of the complaint, on grounds that violations of Section 5 of the Federal Trade Commission Act do not give rise to a private right of action. All defendants except CBS moved to dismiss Count III of the complaint on grounds that, where assets are acquired in violation of Section 7 of the Clayton Act, there is no cause of action against the party whose assets are acquired. Both motions to dismiss were granted on November 27, 1968. In 1970, the district court dismissed Count IV of the complaint. See *Record Club of America, Inc.* v. *Columbia Broadcasting System*, 310 F. Supp. 1241 (E. D. Pa. 1970).

U. S. C. § 13(a); Count V—Unfair Competition, Section 5 of the Federal Trade Commission Act, 15 U. S. C. § 45.

The background of CBS's activities as the first major phonograph record club in this country and of its short-term licensing agreements are set forth in *Columbia Broadcasting System, Inc., et al.*, 72 F. T. C. 27, 65, 76-90, 94 (1967), *reversed*, 72 F. T. C. 322 (1967), *reversed, Columbia Broadcasting System, Inc.* v. *F. T. C.*, 414 F. 2d 974 (7th Cir. 1969), *cert. denied*, 397 U. S. 907 (1970). As a result of a consent decree approved on March 22, 1971, which did not contain any admission by CBS of a violation of law by its terms and provided that exclusive licenses would not be used, the FTC litigation was concluded. RCOA apparently instituted this action in 1968 in reliance on the FTC suit and its 1967 ruling, which was subsequently vacated by the U. S. Court of Appeals for the Seventh Circuit, as noted above. See pages 7 and 8 of plaintiff's brief at Nos. 75-2001 and 75-2002, and defendants' brief in those appeals at pages 5-7.

On May 19, 1971, CBS filed and served its initial interrogatories on RCOA.[7] The interrogatories sought, *inter alia*, detailed information regarding RCOA's costs of obtaining records and tapes, including title and manufacturer's catalog number of each record sold by RCOA (interrogatories Nos. 1, 2, 23 and 25),[8] information regarding the cost to RCOA of acquiring records and tapes under the licensing agreements it had (interrogatories Nos. 3 and 4), the alleged conspiracy (interrogatories Nos. 13, 14 and 15) and the issue of damages (interrogatories Nos. 16 and 17).

On June 23, 1971, more than the 30 days permitted by F. R. Civ. P. 33(a),[9] RCOA interposed specific and general objections. The general objections were grounded on the contentions that (1) the interrogatories were burdensome in that they called for information which would be incomplete until CBS complied with RCOA's discovery requests, and therefore any answers given would necessarily require updating, and (2) as provided under F. R. Civ. P. 33(c),[10] answers to the interrogatories might be derived from documents already made available to CBS (538a).

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[7] The interrogatories are found at pp. 521-537 of the appendix. Until this time, the parties had commenced discovery by the production of documents, the taking of depositions, and the posing of certain interrogatories by RCOA.

[8] RCOA claimed that CBS's exclusive licenses forced RCOA to pay at least 72¢ more per record than it would have to pay in the absence of such licenses.

[9] Rule 33(a) provides in pertinent part:

"The party upon whom the interrogatories have been served shall serve a copy of the answers, and objections if any, within 30 days after the service of the interrogatories."

[10] Rule 33(c) provides:

"Where the answer to an interrogatory may be derived or ascertained from the business records of the party upon whom the interrogatory has been served or from an examination,

On September 3, 1971, CBS moved to compel answers to all of its interrogatories and filed supporting affidavits of two independent accountants retained by CBS, who had examined RCOA's documents and alleged that they did not contain information from which complete answers to CBS's "cost" interrogatories could be compiled (551-568a).

The motion was orally argued on October 22, 1971. In opposition, RCOA reiterated its objections, argued that under Rule 33(c) it was permitted to offer documents in lieu of answers, and asserted that, contrary to the affidavits of CBS accountants, the cost information was ascertainable from the documents already produced.

After oral argument, the court, on October 22, 1971, entered an order granting CBS's motion to compel and directing RCOA to answer the interrogatories (611a).

Some seven months later, on May 19, 1972, RCOA filed answers to the CBS interrogatories. The interrogatories seeking RCOA's costs of acquiring records and tapes were answered by directing CBS to certain documents which RCOA would afford CBS an opportunity to examine (699a). As to the damage and conspiracy interrogatories, RCOA refused to answer until completion of discovery (712a), a ground RCOA had raised formerly by its objections (538a & 540a).

Alleging that RCOA's answers were "totally" nonresponsive, and in "willful violation of the court's order of

audit or inspection of such business records, or from a compilation, abstract or summary based thereon, and the burden of deriving or ascertaining the answer is substantially the same for the party serving the interrogatory as for the party served, it is a sufficient answer to such interrogatory to specify the records from which the answer may be derived or ascertained and to afford to the party serving the interrogatory reasonable opportunity to examine, audit or inspect such records and to make copies, compilations, abstracts or summaries."

October 22, 1971," CBS moved on September 8, 1972, to compel further answers to its interrogatories (745a-784a). RCOA responded by invoking, once again, the "Option to Produce Business Records" granted by F. R. Civ. P. 33(c) (816-52a).

On November 13, 1972, CBS further moved the court to dismiss the action, pursuant to Rules 37 and 41, F. R. Civ. P. (see note 4 above), on the ground that RCOA had failed to file full and complete answers to its interrogatories (881a). Oral argument was heard on these and other motions on November 16 and 17, 1972, at which time RCOA repeated its Rule 33(c) argument. At oral argument, counsel for RCOA responded affirmative to the court's inquiry of whether the CBS interrogatories could be answered, but had "no idea" how long it would take (921-22a).

On November 17, 1972, the district court orally granted CBS's motion to compel RCOA to submit further answers to the interrogatories at its cost and expense. As to all answers completed without reference to Rule 33(c), the court directed that RCOA had a "continuing obligation to further answer such interrogatories as information becomes available." In addition, RCOA was ordered to submit to the court, commencing January 1, 1973, monthly reports summarizing the progress of discovery. The court denied the CBS motion to dismiss the complaint "without prejudice to its renewal in the event of noncompliance with the order heretofore entered" (929-30a).

The court also granted RCOA's motion to lift an order it had previously entered staying all discovery,[11] "subject

[11] The motion to stay discovery had been ordered by the court on May 25, 1972, in an effort to determine whether negotiations could produce settlement between the parties (738a).

to compliance by the plaintiff with the discovery previously ordered" (930a).

Counsel for RCOA commenced submission of its monthly status reports on December 21, 1972 (933a). In its February 1, 1973, report, counsel for RCOA indicated that it would respond to defendants' interrogatories "on or before March 1, 1973" (946a). The March 5, 1973, report projected the response date to be March 16, 1973 (1122a). By May 1, 1973, RCOA "could not in good faith now submit a date by which we expect those answers to be completed. . . ." (1197a). On June 1, 1973, RCOA predicted a completion date of "about August 15-September 15, 1973" (1219a). In the report of September 5, 1973, RCOA expected to submit supplemental answers to certain CBS interrogatories within a week and completion of the CBS cost interrogatories by November 15, 1973 (1448a). On November 7, 1973, RCOA indicated that final and complete answers to the cost interrogatories could not be provided until March 10, 1974 (1512a). The March 7, 1974, report gave notice that answers were "nearing completion" (1582a).

On March 27, 1974, responses to the interrogatories had still not been submitted, and CBS renewed its motion to dismiss the complaint on the grounds of RCOA's persistent failure to supply answers and to comply with the orders of the district court (1596a).

On April 2, 1974, "Plaintiff's Supplemental Answers to CBS' Initial Inerrogatories" were served (1675a). For the most part the answers directed CBS to documents submitted with previous answers or suggested that the information requested be culled from CBS's own files. On April 8, 1974, RCOA served answers to interrogatories Nos. 1, 2 and 23, consisting of volumes of computer print-outs (1635a).

In light of RCOA's actions, on June 25, 1974, CBS filed a motion to compel further answers on the basis that the answers to the interrogatories were "wholly unsatisfactory," or, in the alternative, for an order dismissing the action or precluding the introduction of evidence (1713a).

CBS's motion was granted on November 1, 1974, and RCOA was specifically ordered to provide further answers to interrogatories Nos. 1 and 2, so as to include certain prefix identification numbers,[12] and, as well, to provide further answers to other challenged interrogatories. The order was grounded on the court's finding, after three days of oral testimony, that the computer print-outs did not provide adequate identification of the phonograph records acquired by RCOA, thus making it impossible to determine RCOA's costs (2567a, n. 9). The order also, for the second time, denied CBS's motion to dismiss without prejudice to its renewal in the event that supplemental answers were not filed within thirty days (2386-87a).

On December 10, 1974, which was beyond the 30-day limit, RCOA filed "Plaintiff's Further Answers to Certain CBS Interrogatories" (2394-2413a). Therein RCOA referred to 10 volumes of computer print-outs which had been lodged with the Clerk of the district court four days earlier. RCOA had not served copies of the print-outs on CBS and subsequently the court ordered RCOA to do so (2422a).

On December 24, 1974, RCOA moved for a stay of the instant proceedings on the ground that "on December 23,

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[12] In the record industry, prefix information is included in a record's catalog number for purposes of distinguishing between monaural and stereophonic records, which during most of the relevant period from 1961 to 1969 had different costs and prices.

1974, plaintiff filed a petition for an arrangement under Chapter 11 of the Bankruptcy Act . . . ." Said motion was denied by the court on January 28, 1975 (2418a, 2499a).

In the meanwhile, on January 24, 1975, for the fourth time, CBS moved the court to dismiss the complaint on the ground that RCOA had failed to comply with discovery requests and with orders of the district court dated October 22, 1971, November 17, 1972, and November 1, 1974. In support, CBS alleged that much of the prefix information that RCOA had been ordered to provide was either omitted or erroneously included in the print-out volumes, and that other interrogatories had still not been answered satisfactorily (2441-81a).

The court on May 20, 1975, issued its Memorandum and Order dismissing the actions with prejudice under Rule 37(b)(2)(c) (2602a). RCOA's subsequent motion to alter, amend or vacate judgment was denied on June 25, 1975 (2579a, 2599a). Notice of appeal in this action was filed on July 24, 1975 (2602a).

RCOA contends on this appeal that the district court erred in (1) dismissing the complaints under F. R. Civ. P. 37(b)(2)(c); (2) in abusing its permissible discretion under F. R. Civ. P. 26(b) by the restrictions it imposed on the scope of RCOA's discovery;[13] (3) in dismissing the Clayton Act § 7 counts of the complaints; and (4) in holding that no private right of action exists for injuries stem-

[13] Prior to service of CBS's initial interrogatories, RCOA sought discovery, *inter alia*, with respect to all CBS transactions in recorded tapes prior to August 1969, information regarding CBS non-exclusive licenses, and all documents related to the wholesale, retail price or mail order price charged by CBS or any other record clubs for records and tapes. The district court, in ruling on objections interposed by CBS, denied discovery into these areas (609-10a; 78-79a, Nos. 24-27; 238a, Nos. 24-27).

ming from violations of § 5 of the Federal Trade Commission Act (brief for appellant, p. 2).

We do not reach appellant's latter three contentions since we are of the opinion that the district court was justified in dismissing the complaint.

RCOA's claim that the district court erred in dismissing the complaints under Rule 37(b) is grounded on the following contentions, which are considered below under A-E, respectively: (1) the orders directing RCOA to answer the disputed interrogatories were unlawful; (2) RCOA has, in any event, complied with the court's orders; (3) the trial court made no demonstration why sanctions less onerous than dismissal would have been ineffective to cure whatever defaults it may have perceived; (4) RCOA made a good faith effort to answer, and any claimed default was not willful or caused by matters within its control; and (5) the district court, in disregard of RCOA's right to due process, failed to hold an evidentiary hearing to determine whether RCOA willfully disobeyed the orders of the court (brief for appellant, p. 32).

A. *The district court's orders directing RCOA to answer the cost, conspiracy and damage interrogatories, for example, 1, 2 & 13-17, were justified by the record.*

Although the interrogatories were filed on May 19, 1971, no objections were timely filed and it was not until June 23 that objections, several conclusory in nature, were filed (537-50a). No answers were filed until May 19, 1972. The October 22, 1971, order to answer the original interrogatories was clearly justified by the record. Similarly, the orders compelling further answers of November 18, 1972 (not complied with in any form until RCOA served 9000 pages of print-outs and answers on April 8, 1974) and November 1, 1974, the order to add prefixes and serve further

answers within 30 days, and the December 30, 1974, order to serve answers on CBS were supported by the record. See pages 2-11 of the district court's May 20, 1975, Memorandum (2561-69a). In the above-mentioned Memorandum, the district court pointed out, *inter alia:*

> ". . . RCOA sought to shift the burden, stating that it was possible to compile the necessary information from the documents produced. It made no effort to compile the information and thus expedite the litigation. Its efforts were devoted to delaying rather than expediting discovery.
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> "After oral argument, the Court, on October 22, 1971, entered an order granting CBS's motion to compel and directing RCOA to answer all interrogatories. [2563a]
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> • • •
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> ". . . RCOA was attempting to resurrect its original objection to answering the cost interrogatories, a matter the Court had resolved, it thought, on October 22, 1971. RCOA furnished no answers to the conspiracy interrogatories, and no answers to the so-called 'damage interrogatories' (Interrogatories 16 and 17), stating that answers would be provided after discovery.
>
> "Thereafter on September 8, 1972, CBS again moved to compel answers to most of its interrogatories, but also requested the Court to dismiss the action under Rules 37 and 41 F. R. Civ. P. because of RCOA's failure to answer the interrogatories. This motion was joined in by defendants in the A & M and Kinney cases as well.
>
> "At this point in the proceedings, almost four and one-half years after the institution of the CBS action

> and one year after the Court had directed RCOA to supply answers, the Court would have been fully justified, we think, in dismissing the action. RCOA had simply ignored the order of October 22, 1971, and offered no excuse for its noncompliance. Without answers to CBS's cost, damage or conspiracy interrogatories, defendants were unable to conduct meaningful discovery by oral depositions or otherwise and were obviously prejudiced in their preparation for trial. Moreover, RCOA's unwillingness to answer created grave doubts as to whether RCOA could support at trial the contention, central to its case on both liability and damages, that because of the exclusive licenses held by CBS, RCOA was forced to obtain finished records and tapes at a cost higher than CBS's costs for records and tapes, thus allegedly putting RCOA to a competitive disadvantage in the record club business. [2564-65a].
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> • • •
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> "For the next year and a half, nothing was done by RCOA to advance its cause." [2565a]

The district court was justified on this record in concluding that the print-outs and documents supplied by plaintiff did not constitute an answer to the above-mentioned interrogatories under F. R. Civ. P. 33(c)—see note 10 above. CBS had requested the manufacturer's catalog number of records distributed by RCOA during the relevant period (1961-1969), as well as cost information concerning "discounts, allowances and rebates."

The trial judge's finding that the prefix was a part of the manufacturer's catalog number and that such number was necessary in order to determine RCOA's costs was sup-

ported, *inter alia,* by the testimony taken on August 27, 1974.[14] Under these circumstances, there was no abuse of discretion in refusing the plaintiff permission to answer the cost interrogatories by volumes of print-outs, many of which only contained the numerical number of the record without the letter prefix which identified the record as monaural or stereo in many cases. Since only RCOA knew the percentage discount that was granted by the manufacturer, "the burden of deriving or ascertaining the answer" was not substantially the same for the party serving the interrogatory as for the party served" if the print-outs were to be the sole business records supplied to defendants. See F. R. Civ. P. 33(c).[15]

A Rule 33(c) option to produce business records is available "subject, of course, to the judge's approval." *Burns*

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[14] Even the President of RCOA explained that a person would have to know the percentage discount from the manufacturer's list price to determine whether certain numerical numbers identified monaural or stereo records, and the computer print-outs RCOA contended would show its costs did not show in many cases the prefix or the monaural or stereo designation of the record (2312-13a). Also, on cross-examination, this witness conceded that "you have to have either price information or some other identification" (2333a). In our view, the record in *Daiflon, Inc.* v. *Allied Chemical Corp.*, —— F. 2d —— (10th Cir., Opinion of 4/16/76, 1976—1 Trade Cases 60,829), is quite different from that in this case.

[15] The Advisory Committee's Note to subdivision (c) of F. R. Civ. P. 33, made at the time that subdivision was added to the Rule, includes this language:

> "The interrogating party is protected against abusive use of this provision through the requirement that the burden of ascertaining the answer be substantially the same for both sides. A respondent may not impose on an interrogating party a mass of records as to which research is feasible only for one familiar with the records."

See 48 F. R. D. 487, 524-25.

v. *Thiokol Chemical Corporation,* 483 F. 2d 300, 307 n. 10 (5th Cir. 1973). Here the trial judge heard oral argument on Rule 33(c) and reviewed legal memoranda on the subject. The court, apparently unpersuaded, chose to believe the statements, made under oath, by the two accountants retained by CBS, who, after examining RCOA's books and records, were unconvinced that the information called for in the interrogatories could be compiled from the documents and print-outs.

RCOA also complains that the district court's November 1, 1974, order requiring RCOA to provide prefix information was unlawful, since the information was "wholly irrelevant to the subject matter of the trial." In support, RCOA directs our attention to its offer to stipulate at trial, which CBS rejected, that any ambiguity regarding monaural or stereophonic identification resulting from lack of prefix information could be resolved, within certain cost limitations, adversely to RCOA.[16] We are not convinced that the prefix information was "wholly irrelevant." As mentioned earlier, the district court ordered RCOA to furnish CBS with prefix information after oral testimony, including that of RCOA's president, which led the court to conclude that

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[16] RCOA stated it was prepared to stipulate

> "'that where particular records are prefix sensitive as defined hereafter, and prefix information is not available in RCOA's answers'—and we footnote: or in the computer run that we are prepared to make—'CBS may assume that such records are either monaural or stereophonic, whichever CBS prefers, and RCOA will not contest that assumption.'
>
> "'We recognize that a cost difference of apparently 6.4 cents to 12½ cents for each such record may thus be allocated against RCOA's interest in a way that would reduce the potential damages, but we make the offer to avoid further controversy and to demonstrate that the issue is de minimus when measured against the great quantum of damages in this lawsuit.'" (2370-71a)

prefix information was necessary to determine RCOA's costs. Nor are we persuaded that the court's order was unwarranted by reason of RCOA's proffered stipulation. The stipulation, by its terms, did not adequately provide CBS with the information necessary to meet RCOA's damage allegations or protect it from the consequences of the lack of such information in view of the 12½¢ limitation.

We also recognize no error in the district court's finding that "the answers provided by RCOA are inadequate and unresponsive," and "that there exists no valid excuse for RCOA's failure to supply full and complete answers," and therefore RCOA's claim that it has complied with the district court's discovery orders must fall. A brief summary of the disputed interrogatories and the final answers furnished by RCOA demonstrates the propriety of the district court's finding.[17]

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[17] Interrogatories Nos. 1(iv), 1(xiv), 1(xxi) and 1(xxii) asked for a listing by title and manufacturer's catalog number of all records "manufactured, produced, distributed and/or sold" by four record companies (524a). RCOA answered that it "lacked sufficient knowledge or information" to answer (2396a).

Interrogatory No. 2(viii) sought data regarding allowances, discounts and similar payments "on an annual basis" with respect to each record listed in response to interrogatory No. 1 (525a). RCOA's answer referred to computer print-out material previously submitted (2397a).

Interrogatory No. 2(ix) sought RCOA's "[s]elling price or prices" to record club members with respect to each record listed in response to interrogatory No. 1 (525a). RCOA answered that "[i]t is not possible to determine from plaintiff's business records the price or prices at which a particular record unit purchased by plaintiff was sold during the interrogatory period" (2400a).

Interrogatories Nos. 2(vi), 4(viii), 4(ix) and 4(xvi) requested quantities of records distributed to members as free or bonus records, names and catalog numbers of records distributed under license, "master" records obtained by RCOA under licenses, and "on an annual basis" quantities of record distributed through the club under license (525a-528a). As it had in its previously served answers (1675a), RCOA responded that the information was contained in royalty statements that had already been produced to CBS (2400-02a, 2406a).

Interrogatory No. 4(xii) sought cost information with respect to the manufacture by RCOA of records under license. RCOA responded by making reference to documents previously given to CBS (2403-04a).

Interrogatory No. 4(xiv) sought the selling price of each record under a license agreement (528a). RCOA responded that the information "is not possible to determine from plaintiff's business records" (2405a).

Interrogatory No. 4(xxiv) sought the "value to plaintiff of each licensing agreement" (528a). RCOA responded that it did not assign an accounting value to a license agreement and went on to describe the general benefits of a license agreement (707a).

Interrogatory No. 24 sought price and quantity information, "on an annual basis," regarding RCOA's "10 best selling long playing records" (533a). RCOA responded that its books and records "do not contain the information required to answer the interrogatory" (2411a).

Additionally, many of the responses contained this language:

> "At this time, plaintiff lacks sufficient financial resources to undertake the essentially mechanical, but massive, task, which defendant CBS is as capable of performing as the plaintiff, of transcribing the information from these records in the form demanded in this interrogatory, and plaintiff therefore cannot answer the interrogatory at present" (2574a).

RCOA's reliance on CBS to retrieve information contained in business records and documents supplied to CBS had been rejected by the court through its earlier discovery orders, which are supported by the record.

Moreover, as the district court aptly noted, "RCOA's consistent position has been that the information could be and would be obtained from its books and records, and that it was simply a matter of undertaking the task of compiling the data" (2574a). Accordingly, even if RCOA's final answers were the best it could give, RCOA's repeated assurance that answers were forthcoming undermine any characterization of adequacy or responsiveness which might be attributable to the answers finally submitted. Additionally, lack of financial resources in light of the ap-

parently financially healthy four-year period preceding RCOA's filing for bankruptcy, cannot stand as an excuse to the submission of appropriate responses ordered by the district court.

B. *The district court's conclusion that RCOA had not complied with its discovery orders was not reversible error.*

Our examination of the record persuades us that it supports the following statements in the district court opinion at 2568-69a:

> "Defendants claim that RCOA has failed to supply full and complete answers to CBS's Interrogatories 1(iv), 1(xiv), 1(xxi), 1(xxii), 2(viii), 2(ix), 2(x), 2(xi), 4(viii), 4(ix), 4(xii), 4(xiv), 4(xvi), 4(xxiv) and 24. In addition, CBS asserts that the answers provided by RCOA to Interrogatories 1 and a(i)-2(xi) are inaccurate and deficient. As noted, a copy of the answers to Interrogatories 1 and 2(i)-2(xi) were not served upon CBS and CBS's position is based upon an examination of the computer print-out filed with the Clerk (Thurlby Affidavit filed on January 24, 1975).
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> "In the A & M case, no answers were filed by RCOA as required by the order of November 1, 1974, and in the Kinney case, defendants contend the answers are inadequate on their face.
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> "RCOA has, in opposition to CBS's motion to dismiss, admitted its failure to provide further answers to Interrogatories 2(viii), 2(x), 4(viii), 4(ix), and 4(xxi), as required by the Court's order, but now states that it 'lacks sufficient present resources to answer the remaining interrogatories in whole or in part' (RCOA Memorandum, p. 2, n. 2, Degling Affidavit filed February 19, 1975, ¶¶2-14). In the A & M case, RCOA states that it lacks sufficient financial resources to answer defendants' interrogatories in any fashion (RCOA Memorandum, p. 2, Degling Affidavit filed February 19, 1975, ¶15). RCOA prefaces its answers in the Kinney case by stating: 'Plaintiff is unable at this time to supplement fully the indicated interrogatories within the time frame of December 30, 1974, extended to January 7, 1975, by further order of the Court.'
>
> "The Court finds that defendants' interrogatories are relevant, if not central, to RCOA's claims of liability and damages; that to the extent RCOA has answered at all, the answers provided by RCOA are inadequate and unresponsive; that there exists no valid excuse, in a case pending almost seven years, for RCOA's continued failure, over a period of almost four years, to answer fully and completely, ..."

C. *The court tried less onerous sanctions than dismissal and they proved ineffective to cure the continued refusal of RCOA to answer pending interrogatories.*

In several respects and on several occasions, the district court imposed lesser sanctions than dismissal on RCOA in order to induce it to comply with discovery orders:

1. On November 17, 1972, the district court granted several motions by RCOA for discovery but they were stayed pending the giving by RCOA of discovery concerning which it was delinquent.[18]

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[18] ". . . stayed pending One, compliance by the Plaintiff with the order of the Court regarding the answers to interrogatories heretofore entered; and, Two, the completion of the deposition of Mark Lewis" (930a).

2. In the same order, discovery sought by RCOA (production of documents by CBS) was "denied without prejudice to its renewal upon completion of the discovery previously ordered" (930a).

3. A motion to lift a stay of discovery previously imposed on RCOA was denied in the CBS case "pending compliance by the Plaintiff with the discovery previously ordered" in the same November 1972 order (930a).

4. Counsel for RCOA was directed in the same order "to submit monthly to the court hereafter, commencing on January 1, 1973, and continuing, a brief statement of the discovery undertaken, the progress made and that completed, if any, during the preceding month" (932a).

At the time the above sanctions less than dismissal were imposed, the court denied the first motion of CBS to dismiss the complaint pursuant to F. R. Civ. P. 37 and 41 "without prejudice to its renewal in the event of noncompliance with the order heretofore entered" (929a-930a).

When the second motion of CBS to dismiss was denied on November 1, 1974, it was denied "without prejudice to its renewal in the event that supplemental answers were not filed within thirty days" (2387a). In the same order, the stay of RCOA's discovery was continued "in effect pending compliance with this order until otherwise ordered by this court."

Under these circumstances, the district court's action was in compliance with the language used by this court in the recent decision of *In re Professional Hockey Antitrust Litigation*, —— F.2d —— (Nos. 74-2113/2118, 3d Cir., 2/23/76), *reversed sub nom. National Hockey League* v. *Metropolitan Hockey Club, Inc.*, —— U.S. —— (6/30/76,

No. 75-1558, 44 U.S.L.W. 3754, 3755), where the court said at page 10 of the slip opinion: ". . . it is incumbent on the court in exercising its reasoned discretion to review the possible use of alternative sanctions before it composes the stringent sanctions of dismissal."

As stated by the district court in its May 20, 1973, opinion:

> "This is the fourth time in this action that CBS has moved for dismissal for failure of RCOA to answer interrogatories. On two prior occasions the Court denied the motions, without prejudice to their renewal in the event of noncompliance and on one occasion the motion to dismiss was withdrawn when RCOA at long last supplied certain limited data shortly after the motion was filed.
>
> "As more fully appears in this opinion, the Court has given every conceivable latitude to RCOA in an effort to defer and ultimately avoid the severe sanction of dismissal. However, RCOA's disdainful attitude toward the Court's orders, its interminable delay in providing any answers to relevant interrogatories, and its failure to answer fully and completely those interrogatories when it finally chose to act, compel the Court now to grant defendants' motions.
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> "The Court is not unaware of the severity of the sanction, but RCOA has been repeatedly warned that its continued refusal to comply with the Court's orders would inevitably lead to dismissal. We suspect that RCOA's treatment of the repeated orders of this Court is without precedent. [2560-61a]
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> "We recognize the cardinal principle that dismissal, being the severest of sanctions, is to be most sparingly

used. The sanction of dismissal, though its imposition is committed to our discretion, is one which should not be invoked 'precipitately or rashly.' . . .

"In the light of the history of this case, we have certainly not acted 'precipitately or rashly'.

"We are acutely aware that the sanction of dismissal is permanent and fatal to RCOA's claim and that it must always be 'tempered by the careful exercise of judicial discretion to assure that its imposition is merited.' [Citing case.] Mindful of these cautions, the Court has, in the exercise of discretion, repeatedly and patiently denied the various motions to dismiss previously filed in these actions, time after time giving RCOA additional opportunity to comply with the outstanding discovery orders.

"On the other hand, it is noted that dismissals pursuant to Rule 37 have been upheld in circumstances far less egregious than those involved here. [Citing cases.]

"It is well recognized, and the reason therefor is amply demonstrated in these cases, that dismissal for failure to provide adequate discovery 'is particularly appropriate in complex antitrust litigation like that now before the Court where efficient and effective discovery procedures are essential to orderly adjudication.' [Citing cases.]

"In the *Professional Hockey* case, it appears that plaintiffs had also failed to answer interrogatories relating to the nature and amount of their alleged damages, although, in contrast, there only seventeen months had passed after the filing of the interrogatories. Here, RCOA has had nearly four years to file adequate answers, and to comply with the repeated and outstanding orders of this Court. RCOA has repeatedly benefited by the Court's patience, but in so doing has frustrated the orderly progress of the judicial process and has finally brought upon itself the extreme consequence of dismissal.

"The burdens imposed upon the defendants' resources during the intervening years, the repeated hearings before the Court, the continued arguments over substantially the same or similar issues in discovery, the repeated assurances of future compliance, followed by continued failure or refusal to comply, the continued use or misuse of judicial time and resources and the undesirable congestion of court calendars and dockets compel the conclusion here reached.

"RCOA contends initially (pp. 5-11 of RCOA's Memorandum in Opposition to Motion to Dismiss) that its answers are sufficient to show that RCOA will be able to sustain its burden of proof at trial with respect to its measure of damages, and that, therefore, the answers provided are not deficient. RCOA, however, has failed to meet defendants' assertion that, in order to sustain its burden of proving that the exclusive licenses *caused* injury, RCOA must show that its cost of acquiring finished records was higher than would have been the case had RCOA been able to obtain records pursuant to licenses. This burden necessarily involves a comparison between RCOA's true cost of obtaining records and CBS's cost for obtaining the same records. Notwithstanding years of litigation and days of argument and/or hearing, we have been unable to reach the point of comparison.

"It is, moreover, undisputed by RCOA that the information sought is relevant and is necessary for

defendants to prepare for trial. [Citing cases.] Although RCOA argues that it suffices to introduce at trial evidence only of RCOA's aggregate costs of obtaining unspecified records, defendants certainly have a basic interest in developing and presenting and the right to develop and present to a jury accurate facts surrounding the question whether the phonograph records obtained by RCOA were the same records CBS allegedly obtained at a lower price by license. RCOA's answers are wholly insufficient to provide that crucial information following literally years of discovery litigation.

* * *

"Were this the first time RCOA's failure had come before the Court, RCOA's financial condition might conceivably have a bearing upon the scope of any order requiring answers. It would not serve, however, to excuse a plaintiff from providing any information at all. However, on this record of repeated disobedience to the Court's orders and prolonged delay in providing any responsive information during a long period involving no financial distress, RCOA's present and most recent financial condition cannot excuse its continuing non-compliance. It is abundantly clear to the Court that RCOA is solely responsible for the position in which it now finds itself. At no time before the entry of the Court's orders of October 22, 1971, November 17, 1972, and November 1, 1974, did RCOA suggest that it was unable for any reason to answer the interrogatories. On the contrary, RCOA's consistent position has been that the information could be and would be obtained from its books and records, and that it was simply a matter of undertaking the task of compiling the data, a burden RCOA had initially attempted to place on defendants." [2569a-74a]

D. *The finding of the district court that default of RCOA in producing the requested discovery was willful is not clearly erroneous.*

The district court stated in its May 20, 1975, Memorandum:

> "The Court finds that RCOA's present inability, if such it be, to answer defendants' interrogatories is due solely to RCOA's past willful disregard for the orders of this Court. RCOA's present state of insolvency cannot excuse non-compliance with the order originally entered October 22, 1971, reiterated thirteen months later on November 17, 1972, and once more directed two years later on November 1, 1974. To hold otherwise would countenance a contumacious course of conduct which has already delayed the resolution of this litigation beyond all reasonable bounds and would further, irretrievably prejudice defendants in their defense of the action. RCOA's legal position is not the result of its present or recent financial condition. It is the result of its continued refusal or neglect to meet the burden of discovery properly resting upon it in litigation voluntarily instituted by it. RCOA has never been obliged to involuntarily assume the burdens placed upon the defendants in this protracted and complex litigation. It has long sought to frustrate the defendants in discovery properly sought by them." [2575-76a]

At another point in its Memorandum, the district court quoted from *DiGregorio* v. *First Rediscount Corp.*, 506 F.

2d 781 (3d Cir. 1974), at 788, these words: "[A] pattern of conduct in flagrant disregard both of the general rules of discovery and of a specific court order . . . is 'mirrored in the record'" and stated "a similar pattern of conduct by RCOA is evident on this record" [2575a].

We have concluded that the May 1975 Memorandum contains a sufficient finding of willfulness and fault to satisfy the standard in *In re Professional Hockey Anti-Trust Litigation, supra,* and that the finding is not clearly erroneous.

E. *There was no violation of due process of law in the district court's reaching its finding of willful disobedience of the district court discovery orders.*

The record supports the requirements of the Supreme Court of the United States in *Societe Internationale* v. *Rogers,* 357 U. S. 197, 212 (1958), for dismissal under F. R. Civ. P. 37 as follows:

> ". . . Rule 37 should not be construed to authorize dismissal of this complaint because of petitioner's noncompliance with a pretrial production order when it has been established that failure to comply has been due to inability, and not to willfulness, bad faith, or any fault of petitioner."

This court has held that, even where there is no specific finding of willfulness as opposed to the specific findings here quoted under E at pages 19-20 above, dismissal of the action under F. R. Civ. P. 37 was not an abuse of discretion. See *DiGregorio* v. *First Rediscount Corp., supra*

at 788; *Mangano* v. *American Radiator & Standard Sanitary Corp.,* 438 F. 2d 1187, 1188 (3d Cir. 1971).

It is noted that the district court held a lengthy hearing (2157a-2357a) on August 27, 1974, followed by oral argument on September 24, 1974 (2364a-2369a) concerning the failure of plaintiff to answer the cost interrogatories.

Here, the district court found that RCOA had no valid excuse for failing to provide adequate and responsive answers to defendants' interrogatories, and that RCOA had "willfully disobeyed" the orders of the court over a four-year period (2569a).

That the district court failed to hold a hearing specifically on the issue of willfulness does not, in these circumstances, constitute a violation of due process. An evidentiary hearing would have added little to the voluminous record which the court fully considered, as is its obligation, in making its finding. The court stated in its Memorandum:

> "The Court has on at least three occasions given RCOA a full hearing regarding its failure to answer these interrogatories, including a day of testimony on August 27, 1974. 'Due process' has already led us down this long trail of briefs, reply briefs, supplemental briefs, affidavits, reply affidavits, oral argument, hearings, testimony and counter-testimony. Indeed, considering the burden, financial and otherwise, which that long journey has placed upon the defendants, 'due process' and the cause of justice dictate that *that* trail shall end here." (2574a, n. 11)

II. *The A & M and Kinney Cases (Nos. 75-2002 and 75-1812)*

In June 1970, RCOA brought a second action, in the Southern District of New York, against A & M Records

(A & M) and several other companies engaged in the manufacture and distribution of records and tapes.[19] CBS was named as a co-conspirator. With the exception of the Clayton Act § 7 claim, the complaint alleged the same antitrust and trade regulation violations asserted in the CBS case.[20] (197-228a).

On January 20, 1971, pursuant to 28 U. S. C. § 1407[21] the Judicial Panel on Multidistrict Litigation transferred

[19] A & M Records; A & M General Corp.; Irving Music, Inc.; Herb Alpert; Jerome Moss; Chess Producing Co.; Caedmon Records Inc.; R. D. Cortina Co.; Cortina Institute for Language Study; Disneyland Records; Walt Disney Productions; Wonderland Music Co.; Elektra Corporation; Elektra Records Corporation; Elektra Sales Corporation; Transamerica Corp.; Liberty/AU Distributing Corp.; Metro-Goldwyn-Mayer, Inc.; Metro Records Distributors, Inc.; Monument Records Corporation; Talmadge Productions Inc.; Roulette Records Inc.; Scepter Records, Inc.; Spoken Arts, Inc.; Skye Recording Co.; Campbell Silver Corp.; White Whale Record Co., Inc.; Word Incorporated. Only A & M; Caedmon Records, Inc.; Elektra Sales Corporation; Elektra Corporation; R. D. Cortina, Inc. and Cortina Institute for Language Study remain in this appeal.

[20] The Section 5 FTC claim was subsequently dismissed (645a). Count III, based on Sections 2(a) and 2(f) of the Robinson-Patman Act was also dismissed (1195a). See also footnote 2 above.

[21] 28 U. S. C. § 1407 provides in pertinent part:

> "(a) When civil actions involving one or more common questions of fact are pending in different districts, such actions may be transferred to any district for coordinated or consolidated pretrial proceedings. Such transfers shall be made by the judicial panel on multidistrict litigation authorized by this section upon its determination that transfers for such proceedings will be for the convenience of parties and witnesses and will promote the just and efficient conduct of such actions. . . .
>
> "(b) Such coordinated or consolidated pretrial proceedings shall be conducted by a judge or judges to whom such actions are assigned by the judicial panel on multidistrict litigation. . . ."

the action to the Eastern District of Pennsylvania for "coordinated or consolidated pretrial proceedings" with the CBS case, in recognition that transfer was "likely to produce a substantial savings of time and effort for court and counsel . . . [and] that [r]ulings by [the district court] in the discovery area may also be applicable to the [A & M] case." *In re CBS Licensing Antitrust Litigation,* 328 F. Supp. 511, 512 (JPML 1971).

On November 19, 1971, RCOA filed a third action, also in the Southern District of New York, against Kinney Services, Inc. and its record sales subsidiary, Warner-Elektra-Atlantic Distribution Corporation (hereinafter referred to collectively as "Kinney").

The complaint alleges that Kinney's acquisition of Warner Bros., Elektra and Atlantic Records and the exclusionary and reciprocal trade agreements the acquired companies entered into with Kinney and other unnamed co-conspirators constituted violations of Sections 1 and 2 of the Sherman Act and Section 7 of the Clayton Act (612-630a).

Subsequently on April 19, 1972, the Judicial Panel on Multidistrict Litigation ordered transfer of the Kinney action to the Eastern District of Pennsylvania "for pretrial proceedings" with the CBS and A & M cases. *In re CBS Licensing Antitrust Litigation,* 342 F. Supp. 1177 (JPML 1972). In so doing, the panel stated:

> "The central subject of the complaint is still Record Club's alleged inability to obtain licenses to manufacture and sell phonograph records and tapes, forcing it to purchase finished records and tapes at higher prices than its club competitors and putting it at a competitive disadvantage in the club market. . . .

"Any inquiry into these allegations will cover factual issues common to the earlier actions."

Id. at 1178.

In the fall of 1972, A & M and Kinney joined CBS in its initial motion to dismiss, alleging in support that:

"The interrogatories which plaintiff has refused to answer concern the fundamental issues not only in the *CBS* and *A&M* cases but in the *Kinney* case as well, namely, cost, conspiracy and damages."

(884-885a). Up until this time, neither A & M nor Kinney had served interrogatories on RCOA.

After the CBS motion to dismiss was denied, Kinney, on January 8, 1973, served RCOA with its set of interrogatories and request for documents. The interrogatories pertinent to this appeal are Nos. 16(g) which sought RCOA's separate annual purchases for records and tapes from each of the defendants for the years 1967 through 1973, 16(i), which sought the same information with regard to purchases made from co-conspirators, and 35(d) which sought RCOA's per unit cost for records and tapes for each year since 1967 (973, 1049a).

RCOA filed answers to the Kinney interrogatories on February 22, and 28, 1973 (949, 1071a). With regard to interrogatories Nos. 16(g) and (i), RCOA responded that the information requested was contained in its purchasing records which, pursuant to Rule 33(c) RCOA offered to make available. In addition, RCOA stated that it was compiling a "summary" of these records with which it would supplement its answers in the future (975a). As to No. 35(d), RCOA responded: "OBJECTION-CONFIDENTIAL" (1050a).[22]

In an attempt to get the "general idea of the nature of plaintiff's cost records," Kinney sent a lawyer to review RCOA's documents (2155a). The lawyer was told that when the work necessary to answer the interrogatories was completed, RCOA would give Kinney access to its answers (2156a).

On March 20, 1973, RCOA filed with the court "Plaintiff's Application for Entry of an Order Providing For Coordination of Discovery." Thereafter on April 11, 1973, the court entered the following order:

"That all testimony, documents, or other information (hereinafter 'discovery') taken or produced in any action now coordinated for pre-trial proceedings before the United States District Court for the Eastern District of Pennsylvania under the style 'CBS licensing antitrust litigation (MDL No. 59)' (hereinafter 'coordinated actions') shall be deemed taken or produced in each such action, subject to the provisions of this [confidentiality] stipulation, provided that nothing herein shall be deemed to preclude any

[22] On July 19, 1973, Kinney moved the court to dismiss the complaint, or, alternatively, to compel RCOA to answer certain of the interrogatories regarding defendants' alleged conspiracies, exclusionary agreements, and their anticompetitive effect, which were previously answered by RCOA in an "evasive," "inadequate," and "incomplete" manner (1224-1260a). Kinney did not challenge the cost interrogatories [Nos. 16(g), 16(i), and 35(d)] in its motion to compel on the belief that RCOA would supply it with the "summary" it was preparing (2155a). After hearing, the court, on December 11, 1973 and January 25, 1974, ordered Kinney's motion to compel with regard to several of the challenged interrogatories (1524, 1530a). RCOA filed its answers, pursuant to the orders, on March 6, 1974 (1584a).

> party from taking whatever discovery it deems necessary for the preparation or trial of any of these coordinated actions."

(1188-1189a).

On March 11, 1974, A & M served on RCOA its third set of interrogatories (1584a).[23] Interrogatories Nos. 1-4 were substantially similar to the CBS interrogatories which sought cost information with regard to records and tapes distributed to RCOA members. They differed from the CBS interrogatories in that they asked for cost information regarding RCOA transactions after 1969 in addition to transactions occurring during the years 1961 through 1969.

RCOA proffered its answers to the A & M "cost" interrogatories on May 7, 1974 (1681a) and May 15, 1974 (1692a). Therein, RCOA stated that the information sought as to transactions occurring from 1961-1969 had already been provided to counsel for CBS. As to transactions occurring after 1969, RCOA offered to make its business records available for inspection pursuant to Rule 33(c).

On July 18, 1974, A & M and Kinney moved the court to dismiss the actions, or in the alternative, to compel further answers to the above-mentioned interrogatories, or to issue an order precluding the introduction of evidence (1954-1955a). The basis for the motion was "plaintiff's willful failure to answer defendants' interrogatories . . .

[23] A & M had served RCOA with its first set of interrogatories on January 29, 1973 (939a), to which RCOA responded on March 23, 1973 (1141a). A second set was prepared and served on RCOA March 19, 1973 (1125a). Answers were made on April 3, 1973 (1173a). The interrogatories concerned information not relevant to this appeal.

which are, in large part, a carbon copy of interrogatories which this court twice ordered plaintiff to answer in the companion CBS case" (1958a). Many of the same arguments advanced by CBS in its June, 1974 motion to dismiss, were adopted by A & M and Kinney in support (1959-1966a).

On November 1, 1974, the court issued an order, separate from its order of that date in the CBS case, compelling RCOA to make further answers to the A & M and Kinney interrogatories. It further ordered that:

> "[D]efendant's motions to dismiss this action or for an order precluding certain evidence at trial are DENIED without prejudice to their renewal in the event that supplemental answers are not filed within sixty (60) days from the date of this order."

(2389a). This order was subsequently amended to provide an extension until January 7, 1975.

RCOA met the court's deadline with respect to the Kinney interrogatories. The answers to the interrogatories were prefaced by the following:

> "Plaintiff is unable at this time to supplement fully the indicated interrogatories within the time frame of December 30, 1974 extended to January 7, 1975 by further order of the Court. The requested information is contained in thousands of documents and is not computerized. . . ."

(2429a). As to interrogatories Nos. 16(i) and 35(d) RCOA additionally stated:

> "[P]laintiff respectfully refers to its responses to interrogatories previously filed with this Court in these

> coordinated proceedings, in particular the computer price study filed in response to the interrogatories of the CBS defendants, which by order of this Court is deemed discovery taken herein."

(2431a).

RCOA did not file supplementary answers to the A & M interrogatories.

In response to RCOA's motion to stay proceedings on the basis of its bankruptcy petition, A & M and Kinney, on January 30, 1975, cross-moved to dismiss the actions on the ground that RCOA had failed to comply with discovery requests and with the order of the district court dated November 1, 1974 (2471a). A supporting affidavit also alleged:

> "Since the interrogatories in *A&M* overlap with the interrogatories in *CBS* for the period 1961-69, RCOA's failure to serve adequate answers in *CBS* is an additional ground for dismissal of the *A&M* action herein."

(2474*a).

As stated above the actions were dismissed with prejudice by court order on May 20, 1975.

The same grounds for appeal raised by RCOA in the CBS case are asserted in the A & M case.

In the Kinney case, RCOA asserts that the district court erred in (1) ordering further answers to interrogatories Nos. 16(g), 16(i) and 35(d) since it improperly rejected RCOA's reliance on Rule 33(c); and (2) in dismissing the Kinney action since, as RCOA claims, it did not willfully disobey the court's November 1974 discovery order; the answers served by RCOA were in substantial compliance

with the court's November 1974 order, and it was error in ordering dismissal to rely on RCOA's alleged failures to comply with prior discovery orders in the CBS and A & M cases.

The imposition of sanctions under Rule 37(b) relates solely to situations in which the court has made an order to provide discovery which a party has failed to obey. 4A Moore's Federal Practice ¶37.03[2].

In ordering dismissal of the A & M and Kinney cases, the district court relied on RCOA's willful disobedience of the "orders" of the court requiring answers to the challenged interrogatories. A review of the district court record, however, reveals that only one discovery order of significance to the ruling on dismissal, dated November 1, 1974, was issued in the A & M and Kinney cases.

We therefore are presented with the question, raised by RCOA, of whether it was proper for the district court, in ruling on the motion to dismiss in the A & M and Kinney cases, to rely upon RCOA's failure to comply with the prior discovery orders in the CBS case, in addition to RCOA's failure to comply with the discovery order in the A & M and Kinney actions.

Initially, it must be stated that no formal order of the Multidistrict Panel or of the district court expressly made all prior discovery orders in CBS applicable to the A & M and Kinney actions.

The Multidistrict Panel's decision transferring the A & M case to the Eastern District of Pennsylvania for coordinated or consolidated pretrial proceedings with CBS did, however, suggest that the district court's "[r]ulings" in the "discovery area" might be applicable to the A & M case. Likewise, its later decision transferring the Kinney action contemplated similarity of treatment regarding inquiries into "factual issues common to the earlier actions."

Nonetheless, the possibilities expressed by the Panel were not determinative of the manner and effect of discovery conducted during the pretrial proceedings, for that judicial purpose belongs to the transferee judge. In *In Re Equity Funding Corporation of America Securities Litigation,* 375 F. Supp. 1378, 1384 (JPML 1974), it was held:

> "The statute speaks in terms of transfer to 'any district for coordinated or consolidated pretrial proceedings.' 28 U.S.C. § 1407(a). Used in the disjuctive [sic], the critical words denote different judicial functions. They are indicative of the flexibility and resourcefulness implicit in the legislation. They were undoubtedly intended to confer on a transferee judge the power to fashion the discovery program to accommodate the different facets and nuances of the litigation. It is the province of the Panel to decide whether in the first instance the litigation should be *transferred* for coordinated or consolidated pretrial proceedings. It is the province of the transferee judge to determine whether and to what extent the pretrial proceedings should be coordinated or consolidated. We have repeatedly declined to attempt to determine in what way and to what extent the litigation should be coordinated or consolidated. From the very beginning we have left that determination to the discretion of the transferee judge."

Here, the scope of discovery coordination was delineated by the district court in its April 1973 order directing that all discovery taken or produced in the CBS case be deemed taken or produced in the A & M and Kinney cases as well.[24]

[24] It is also to be noted that even prior to the April 1973 coordination order, the district court did fashion discovery orders

The Manual for Complex Litigation recommends that following the adoption of coordination of pretrial proceedings those procedures applicable to "consolidation" of complex pretrial litigation should be employed. Part 1, 5.23. Through consolidation, the purpose of which is to "avoid unnecessary effort, costs and delays, . . . rulings in all related cases can often be made at one time in one document . . ." Part 1, 5.02. With respect to subsequently transferred cases the Manual states, "the court can provide by order that the earlier discovery shall be considered accomplished in the later cases . . ." Part 1, 3.11.

Coordination of discovery, then, has as its base function, the avoidance of duplication. It also contemplates the unification of any legal rulings with respect to discovery. In this light, we hold that the district court's April 1973 coordination order was intended to make all prior and future discovery orders in the CBS case, unless otherwise necessary, applicable to the A & M and Kinney actions. It is highly illogical to assume that a legal ruling judging the adequacy of answers to certain interrogatories, which are deemed available to all parties in the CBS, A & M and Kinney actions, and orders compelling further answers to those interrogatories, should not apply equally to all of the parties.[25]

with the purpose of relying on prior discovery. The orders discussed in n. 22, *supra,* contain the language "defendant['s] . . . motion to compel further answers to interrogatories . . . is GRANTED to the extent that said information can be obtained from the coordinated discovery in the related actions . . . (1521-1523a, 1530-1532a).

[25] It is clear that the district court had the power to enter judgment of dismissal of these two actions under F. R. Civ. P. 37 and 41 even though they had been transferred from the United

Further, the fact that the district court issued a separate order on November 1, 1974 in the A & M and Kinney cases, does not diminish the effect of the district court's coordination order. The separate order was necessary to compel further answers to interrogatories not posed by CBS, namely those interrogatories seeking cost information regarding the years 1970-1973. The separate order took into account the differences in facts sought to be developed in the transferred A & M and Kinney actions. See *Southern Railway Company* v. *Templar*, 463 F. 2d 967, 971 (10th Cir. 1972).

As earlier stated, the previous orders of the district court requiring supplementation of answers submitted by RCOA in response to the CBS interrogatories were proper. Since A & M and Kinney had to rely on the answers to these CBS interrogatories in the cases against them and the answers made by RCOA to the similar A & M and Kinney interrogatories were, in large part, the same as those made to CBS, we deem justified the district court's reliance on RCOA's disobedience of those orders in directing dismissal in the A & M and Kinney actions. Additional support for the district court's dismissal order is found in RCOA's failure to adhere to the November 1, 1974 discovery order, which RCOA totally disregarded with respect to the A & M interrogatories and displayed less than substantial compliance with regard to the Kinney interrogatories.

States District Court for the Southern District of New York. See *Humphreys* v. *Tann*, 487 F. 2d 666, 667 and 670 (6th Cir. 1973); *Reidinger* v. *Trans World Airlines, Inc.*, 463 F. 2d 1017, 1018 n. 2 (6th Cir. 1972).

For all of the foregoing reasons the May 20, 1975 order of the district court in the A & M and Kinney actions will be affirmed.

AFFIRMED.

TO THE CLERK OF THE COURT:

Please file the foregoing opinion.

.....

United States Circuit Judge

Appendix C

Excerpt from Prager & Fenton examination of the books and records of Record Club of America, Inc., dated June 27, 1974.

(See Opposite) ☞

PRAGER AND FENTON
CERTIFIED PUBLIC ACCOUNTANTS
NEW YORK · LOS ANGELES · LONDON

JOSEPH FENTON, C.P.A.
LEONARD SPITALNIK, C.P.A.
LEO STRAUSS JR., C.P.A.
ABRAHAM KAHANER, C.P.A.
ROBERT MARGOLIES, C.P.A.
ROBERT BANDMAN, C.P.A.

122 EAST 42ND STREET
NEW YORK, N.Y. 10017
(212) 687-8444

EXHIBIT C

June 27, 1974

Polydor Incorporated
1700 Broadway
New York, New York 10019

Gentlemen:

Pursuant to our engagement, we have examined the books and records of

RECORD CLUB OF AMERICA, INC.
(hereafter referred to as RCOA)

for the purpose of ascertaining areas of underpayment, if any, and their extent with respect to royalty accountings rendered to

POLYDOR INCORPORATED

The period covered by this report is from October 15, 1972 to September 30, 1973.

The amount due, as set forth in this report and, where appropriate, in the attached schedules is $110,027.88, subject to the comments set forth below.

The examination was made in the light of an Agreement dated October 15, 1972, between Record Club of America, Inc. and Polydor Incorporated.

Necessary interpretations with respect to this Agreement were made by your counsel.

iness purpose for maintaining such reserves. Royalties due thereon aggregate $380.94 on units treated as sold by RCOA. We have not determined royalties on "free" records shipped, inasmuch as the quantities reflected in Schedule 1 are based on actual quarterly activity before adjustment for reserves.

Sales Under 25 Units

RCOA failed to pay royalties on those records which enjoyed sales of less than 25 units in a three month period. We were informed that the reason for this is that RCOA had probably purchased finished product rather than pressing such small quantities. Substantiation of this contention was not supplied. It is also possible that such small sales may have been made from pre-existing inventory. Accordingly, we have determined royalties due on such sales as set forth in Schedule 3 which aggregates $541.71.

Unaccounted Production

We have examined, extensively, the movement of a group of records for a six month test period, in an effort to reconcile inventory and production data to units shipped. The seven record sample utilized in this test represented in excess of 55% of total shipments of your product during the test period, and, therefore, in our opinion, constituted a meaningful sample. We determined that 28.08% of unit production was unaccounted for, as set forth in Exhibit "C". No allowance has been made for defective records in this computation, inasmuch as many such records are sold to employees at reduced rates. Based upon information supplied by RCOA which was not verified by us, defective records are only approximately 1.3% of shipments. Royalties due you on unaccounted production aggregate $27,708.16 as set forth in Schedule 4,

EXHIBIT "C"

POLYDOR INCORPORATED

RE: RECORD CLUB OF AMERICA, INC.

UNACCOUNTED PRODUCTION

DECEMBER 31, 1972 TO JUNE 30, 1973

Label	Catalog No.	Inventory 12/31/72	Purchases	Quantity Available	Inventory 6/30/73	Derived Units Shipped	Shipments Per Royalty Run: Sales	Shipments Per Royalty Run: Free	Total Shipped	Units Unaccounted
Polyd	3502	2,592	9,927	12,519	980	11,539	4,527	6,171	10,698	841
Polyd	3503	1,972	28,613	30,585	3,837	26,748	10,244	11,876	22,120	4,628
Polyd	5027	495	21,600	22,095	1,787	20,308	670	15,921	16,591	3,717
Polyd	5036	—	6,100	6,100	100	6,000	305	2,922	3,227	2,773
Deugr	2530-309	—	2,000	2,000	1,854	146	3	121	124	22
Polyd	5019	—	7,350	7,350	84	7,266	626	3,199	3,825	3,441
Sprin	5704	—	1,000	1,000	—	1,000	41	375	416	584
Total		5,059	76,590	81,649	8,642	73,007	16,416	40,585	57,001	16,006

Percentage Unaccounted Production (57,001 : 16,006) 28.08%

Note:- No trans-shipments to RCOC on above numbers

Appendix D

Excerpt from Prager & Fenton examination of the books and records of Record Club of America, Inc., dated November 16, 1974.

(See Opposite) ☞

PRAGER AND FENTON
CERTIFIED PUBLIC ACCOUNTANTS
NEW YORK · LOS ANGELES · LONDON

JOSEPH FENTON, C.P.A.
LEONARD SPITALNIK, C.P.A.
LEO STRAUSS, JR., C.P.A.
ALBERT KAHANER, C.P.A.
ROBERT MARGOLIES, C.P.A.
ROBERT BANDMAN, C.P.A.

122 EAST 42ND STREET
NEW YORK, N.Y. 10017
(212) 687-5444

EXHIBIT D

November 16, 1974

Bell Records
1776 Broadway
New York, N.Y. 10019

Gentlemen:

Pursuant to our engagement, we have examined the books and records of

RECORD CLUB OF AMERICA, INC.
(hereafter referred to as RCOA)

for the purpose of ascertaining areas of underpayment, if any, and their extent with respect to royalty accountings rendered to

BELL RECORDS
A DIVISION OF COLUMBIA PICTURES INDUSTRIES, INC.
(hereafter referred to as Bell)

The period covered by this report is from June 8, 1971 to March 31, 1974, except where otherwise indicated.

The amount due, as set forth in this report and, where appropriate, in the attached schedules is $419,335.38 subject to the comments set forth below.

The examination was made in the light of an Agreement dated June 8, 1971, as well as a Letter of Amendment dated June 10, 1971, between RCOA and Bell.

Necessary interpretations with respect to this Agreement were made by your counsel and by Mr. Allan Cohen.

Sales Under 25 Units

RCOA failed to pay royalties on those records which enjoyed sales of less than 25 units in a three month period. We were informed that the reason for this is that RCOA had probably purchased finished product rather than pressing such small quantities. Substantiation of this contention was not supplied. It is also possible that such small sales may have been made from pre-existing inventory. We have determined royalties due on such sales as set forth in Schedule 4 which aggregates $656.86. Inasmuch as this practice took place for periods subsequent to January 1, 1972, Schedule 4 reflects units only for such periods.

Unaccounted Production

We have examined, extensively, the movement of a group of records for a six month test period, in an effort to reconcile inventory and production data to units shipped. The eleven record sample utilized in this test represented in excess of 42% of total shipments of your product during the test period and, therefore, in our opinion, constituted a meaningful sample. We determined that 23.44% of unit production was unaccounted for, as set forth in Exhibit "D". No allowance has been made in this computation for the issuance of replacement records, more fully discussed in the "General Comments" section of this report. RCOA's bookkeeping records did not provide data to enable us to estimate the extent of this practice which would also appear to be subject to royalties. No allowance has been made for defective records, inasmuch as many such records are sold to employees at reduced rates. Based upon information supplied by RCOA which was not verified by us, defective records are only approximately 1.3% of shipments. Royalties due you on unaccounted production from January 1, 1972 to March 31, 1974 aggregate $115,087.25 as set forth in Schedule 5, based on the assumption that the entire difference represents distribution subject to royalties. In connection with this, we again call your attention to activity which is not reflected in royalties as set forth above in the "General Comments" section of this report.

Unaccounted Production - General Ledger Analysis

Prior to 1972, RCOA reflected unit sales in royalty accountings based on units produced, as adjusted by inventory changes, and reduced by "free" shipments (as determined by RCOA). By utilizing RCOA's general ledger cost of sales amounts and dividing by average unit costs, we compiled production units to be accounted for in a six month test period ended December 31, 1971. This analysis revealed that 8.43% of production units were not accounted for in RCOA's shipment records. We have determined royalties due you from this source in the amount of $5,205.94, as set forth in Schedule 6.

Excess Artist Royalties

The Agreement provides that RCOA shall pay an excess royalty for all artists to whom you are required to pay a royalty rate in excess of 4% of 90% of the base price. For periods prior to July 1, 1972, RCOA's accountings failed to reflect such excess. Royalties due you from this source, based on units reported as sold by RCOA, amount to $3,587.08 as detailed in Schedule 7.

Average rates utilized in this report were based on RCOA's accountings and, therefore, are understated to the extent that they do not reflect omitted excess artist royalties in periods prior to July 1, 1972. Accordingly, a portion of the amount due as set forth in Schedule 5 (Unaccounted Production), and the entire amounts due as set forth in Schedule 3 (Sales - Sliding Scale Membership), Schedule 4 (Sales Under 25 Units) and Schedule 6 (Unaccounted Production - General Ledger Analysis) are understated. Based upon appropriate tests, we have determined that approximately $6,100.00 is due because of such understatements.

SCHEDULE 5

BELL RECORDS

RE: RECORD CLUB OF AMERICA, INC.

UNACCOUNTED PRODUCTION

JANUARY 1, 1972 TO MARCH 31, 1974

	Units Shipped					
Period Ended	"Free" Shipments	Allowance For "Member Get a Member" 11.83% (Exhibit "B")	Sales (Exhibit "A")	Total	Average Royalty Rates (Exhibit "A")	Amount
4/1/72	122,159	(14,451)	26,419	134,127	$.4854	$ 65,105.25
6/30/72	89,703	(10,612)	24,995	104,086	.4626	48,150.18
9/23/72	88,229	(10,437)	20,704	98,496	.5150	50,725.44
12/30/72	95,265	(11,270)	18,716	102,711	.5339	54,837.40
4/7/73	88,520	(10,472)	25,159	103,207	.5294	54,637.79
6/30/73	92,317	(10,921)	17,136	98,532	.5206	51,295.76
9/30/73	78,688	(9,309)	13,904	83,283	.5428	45,206.01
12/31/73	109,997	(13,013)	22,344	119,328	.5315	63,422.83
3/31/74	107,248	(12,687)	15,311	109,872	.5243	57,605.89
	872,126	(103,172)	184,683	953,642		$490,986.55

Percentage of Units Unaccounted (Exhibit "D") 23.44

ROYALTIES DUE $115,087.25

SCHEDULE 6

BELL RECORDS

RE: RECORD CLUB OF AMERICA, INC.

UNACCOUNTED PRODUCTION - GENERAL LEDGER ANALYSIS

JUNE 8, 1971 TO DECEMBER 31, 1971

	Records		Tapes		Total Units
Inventory - 7/1/71		$ 714,628		$ 203,890	
Cost - 7/1/71 - 9/18/71	$ 696,371		$ 225,156		
9/19/71 - 12/25/71	1,356,664	2,053,035	292,274	517,430	
		2,767,663		721,320	
Less: Inventory - 12/25/71		1,277,640		287,734	
Cost of Goods Sold		1,490,023		433,586	
Divided by Estimated Cost Per Collated Unit		$.43		$.75	
Units Shipped		3,465,170		578,115	4,043,285
Units Shipped Per Royalty Summary					
Sales - 7/1/71 - 9/18/71				276,215	
Sales - 9/19/71 - 12/25/71				556,088	
"Free" Shipments - 7/1/71 - 9/18/71				1,131,036	
"Free" Shipments - 9/19/71 - 12/25/71				1,415,641	
Approximate Number of Units - Album Packages				350,000	3,728,980
Units Unaccounted During Test Period					314,305
Percentage of Sales Unaccounted During Test Period (Carried Forward)					8.43%

EXHIBIT "D"

BELL RECORDS

RE: RECORD CLUB OF AMERICA, INC.

PERCENTAGE UNACCOUNTED PRODUCTION

JULY 1, 1973 TO DECEMBER 31, 1973

Catalog No.	Physical Inventory 6/30/73	Purchases	Physical Inventory 12/31/73	Derived Units Shipped	Shipments per Royalty Run		Total Shipped	Units Unaccounted
					Sales	"Free"		
Bell 1106	4,960	15,880	1,295	19,545	1,133	18,247	19,380	165
BIGTR 2013	2,404	10,891	41	13,254	1,231	10,429	11,660	1,594
Bell 1102	4,163	9,587	2,343	11,407	2,348	6,280	8,628	2,779
Bell 1118	689	12,125	861	11,953	1,241	9,849	11,090	863
Bell 1112	7,935	11,486	3,326	16,095	1,924	8,590	10,514	5,581
Bell 1120	5,470	12,740	9,736	8,474	2,139	5,882	8,021	453
Bell 1116	12,896	4,774	5,027	12,643	1,666	9,889	11,555	1,088
Bell 1300	992	11,746	1,132	11,606	417	5,055) 2)	5,474	6,132
BIGTR 2101		7,303	3,345	3,958	211	1,259	1,470	2,488
Bell 6081	350	2,950	247	3,053	1,065	1,551	2,616	437
Bell 6071	1,597	3,200	19	4,778	742	3,441	4,183	595
Total	41,456	102,682	27,372	116,766	14,117	80,474	94,591	22,175

Percentage of Units Unaccounted to Total Units Shipped 23.44

IN THE

Supreme Court of the United States

OCTOBER TERM, 1976

No. 76-543

IN RE: CBS LICENSING ANTITRUST LITIGATION

RECORD CLUB OF AMERICA, INC.,
Petitioner,

vs.

COLUMBIA BROADCASTING SYSTEM, INC., ET AL.,
Respondents.

RECORD CLUB OF AMERICA, INC.,
Petitioner,

vs.

A & M RECORDS, ET AL.,
Respondents.

RECORD CLUB OF AMERICA, INC.,
Petitioner,

vs.

KINNEY SERVICES, INC., ET AL.,
Respondents.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Third Circuit

RESPONDENTS' BRIEF IN OPPOSITION

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Dated: November 17, 1976

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Respondents.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Third Circuit

RESPONDENTS' BRIEF IN OPPOSITION

Respondents in all three of the above captioned actions submit this brief in opposition to the petition for a writ of certiorari to the United States Court of Appeals for the Third Circuit filed by petitioner Record Club of America, Inc. ("RCOA"). Pursuant to orders of the Judicial Panel on Multi-district Litigation, these three actions had been coordinated before the United States District Court for the Eastern District of Pennsylvania (Hon. E. Mac Troutman, J.) under the joint caption, "In Re: CBS Licensing Antitrust Litigation".

OPINIONS BELOW

In addition to the opinions of the Court of Appeals and the District Court, Exhibits A and B, respectively, in the appendix to the petition, the following orders of the District Court are pertinent:

1. Order of October 22, 1971 (Appendix 1 to this Brief)
2. Order of November 17, 1972 (Appendix 2 to this Brief)
3. Order of April 11, 1973 (Appendix 3 to this Brief)
4. Order of November 1, 1974 (*CBS* action) (Appendix 4 to this Brief)
5. Order of November 1, 1974 (*A & M* and *Kinney* actions) (Appendix 5 to this Brief)
6. Order of December 30, 1974 (Appendix 6 to this Brief)

QUESTION PRESENTED

The petition presents no issue worthy of review by the Supreme Court. The only question it presents is whether this Court should review, on the merits, the holdings below that these three coordinated civil actions were properly dismissed under Rule 37(b)(2)(C) of the Federal Rules of Civil Procedure for RCOA's willful refusal over a period of four years to comply with five discovery orders.

STATEMENT OF THE CASES

Preliminary Statement

Only a few months ago, this Court summarily reversed a decision by the Court of Appeals for the Third Circuit which had overturned a District Court's dismissal of the complaint for failure by plaintiff to comply with discovery orders, *National Hockey League* v. *Metropolitan Hockey Club, Inc.*, 96 S. Ct. 2778 (1976). Here, the Court of Appeals followed the *National Hockey League* decision and, after reviewing in detail the factual circumstances which led to the District Court's decision, unanimously held, on a voluminous record including a 2,663-page appendix, that the District Court did not abuse its discretion in dismissing these cases under Rule 37 of the Federal Rules of Civil Procedure. The dismissal was based on RCOA's willful refusal over a period of four years to comply with five orders of the District Court to answer interrogatories, a course of conduct which the District Court properly termed "disdainful" and "without precedent" (3a).* In a 39-page opinion, the Court of Appeals correctly held that the District Court's order was fully supported by the record.

RCOA argues that its repeatedly rejected attempts to avoid discovery by seeking refuge in Rule 33(c), Fed. R. Civ. P., as an answer to *some* of the interrogatories unilaterally entitled it to disregard totally five orders requiring it to answer those *and other* interrogatories.

The District Court conducted numerous hearings over the period of four years to determine whether or not RCOA's answers were adequate. Each time the District Court found them inadequate and directed further answers. Each time RCOA sought refuge in Rule 33(c), the Court patiently heard argument (and reargument) and considered the evidence as to whether the tendered documents supplied the information sought and whether the burden of obtaining the information was equal as between the parties. The Court read and considered hundreds of pages of affidavits and memoranda and heard the testimony of five witnesses, including the president of RCOA, on whether RCOA had properly responded to the interrogatories. Before dismissing these cases, the Court held five long hearings, including a full day of testimony. Upon this record, the Court of Appeals properly found no abuse of discretion.

On this petition, RCOA asks this Court to reexamine the record and substitute its judgment for that of the District Court and the Court of Appeals.

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*References followed by the letter "a" are to pages of the appendix to the petition.

The Facts

A complete description of "the tortuous course of this protracted litigation" (3a) is set forth in the opinions below. The relevant facts can be summarized as follows:

A. The Coordinated Actions

In May 1968, RCOA, by its own designation "the second largest record club in the industry",* filed a complaint in the Eastern District of Pennsylvania against Columbia Broadcasting System, Inc. ("CBS") and a number of other companies alleging violations of the antitrust laws (the "*CBS* action"). The gravamen of each claim for relief was substantially identical. As stated by the Court of Appeals:

> ". . . the alleged violations arose from certain exclusive licenses granted CBS by the manufacturers [of records and tapes] for purposes of marketing records and tapes through its mail order operations. As a result, RCOA claimed it was forced to purchase similar records and tapes from distributors, manufacturers and others at *costs* higher than those incurred under CBS licenses." (23a-24a).

Accordingly, a comparison of the cost to RCOA of its purchased records with the cost to CBS of its licensed records was the key issue in the case since the cost differential theory was basic to both the prosecution and the defense.

In June, 1970, RCOA brought a second action against various CBS licensors, including A&M Records, Inc. ("A & M") and several other companies engaged in the manufacture and distribution of records and tapes (the "*A & M* action"). The action was brought in the Southern District of New York.

Columbia Broadcasting System, Inc. v. *F. T. C.*, 414 F. 2d 974, 981 (7th Cir. 1969). While RCOA was in violation of court orders regarding discovery in these cases, this "small privately owned company" (Petition, p. 4) grew from sales and revenues of $6,450,567 in 1968 to over four times that amount for the fiscal year ended June 30, 1972.

CBS, although not named as a defendant, was alleged to be a co-conspirator. Except for a claim under § 7 of the Clayton Act, the *A & M* complaint alleged the same antitrust violations asserted in the *CBS* action, i.e., that the licenses to CBS resulted in RCOA's cost of records being substantially higher than the cost to CBS of the same records. Once again, the cost differential theory was the key issue in this case.

In January, 1971, the *A & M* action was transferred by the Judicial Panel on Multidistrict Litigation to the Eastern District of Pennsylvania for "coordinated or consolidated pretrial proceedings" with the *CBS* action, *In re CBS Licensing Antitrust Litigation*, 328 F. Supp. 511, 512 (J. P. M. D. L. 1971).

In November, 1971, RCOA brought a third action concerning the CBS licensing policies, this time against Kinney Services, Inc. and Warner-Elektra-Atlantic Distributing Corp. (collectively "Kinney"), respectively the parent company and the record distribution affiliate of various licensors of CBS (the "*Kinney* action"). Like the *A & M* action, the *Kinney* action was initially filed in the Southern District of New York. The gravamen of RCOA's complaint in the *Kinney* action was essentially identical to that in the *CBS* and *A & M* actions. RCOA contended that the defendants conspired with other "co-conspirators", including CBS, to enter into so-called "reciprocal exclusionary agreements", the effect of which was to deprive RCOA of licenses to manufacture records and tapes on the various Kenney labels. Again, RCOA claimed that, as a result of defendants' alleged violations of the antitrust laws, its costs of acquiring records and tapes were substantially higher than they would have been under licenses.

In an apparent effort to avoid transfer of the *Kinney* action to the Eastern District of Pennsylvania, where its two other CBS licensing antitrust actions were pending, RCOA sought to differentiate its *Kinney* complaint from those in *CBS* and *A & M*. To this end, it tacked on to its *Kinney* complaint a challenge under § 7 of the Clayton Act to Kinney's acquisition of its record manufacturing subsidiaries and the estab-

lishment of a single subsidiary to distribute records and tapes. The Multidistrict Panel thwarted this attempt by RCOA to keep the *Kinney* action in New York. In April, 1972, it directed that the *Kinney* action be transferred to the Eastern District of Pennsylvania for "coordinated pretrial proceedings" with the *CBS* and *A & M* actions, *In re CBS Licensing Antitrust Litigation*, 342 F. Supp. 1177, 1178 (J. P. M. D. L. 1972). In its transfer decision, the Panel said:

> ". . . we agree with Kinney's assertion that all three complaints grow out of a single grievance. The central subject of the complaint is still Record Club's alleged inability to obtain licenses to manufacture and sell phonograph records and tapes, forcing it to purchase finished records and tapes at higher prices than its club competitors and putting it at a competitive disadavtange in the club market. . . . *Any inquiry into these allegations will cover factual issues common to the earlier actions.*" 342 F. Supp. 1177-1178 (emphasis added).

B. **The Coordination Order**

After the transfer of the *Kinney* action, RCOA moved for an order coordinating discovery in all three actions. On April 11, 1973, the District Court entered such an order which provided, in pertinent part, that all discovery taken or produced in any coordinated action "shall be deemed taken or produced in each such action" (Appendix 3; ¶ 1).*

C. **The CBS Interrogatories**

On May 19, 1971, CBS served its initial interrogatories on RCOA. The interrogatories sought, *inter alia*, detailed information with respect to RCOA's actual costs of obtaining records, including the amounts of discounts, rebates, advertising allowances and other considerations which RCOA had obtained from its suppliers which necessarily affected such costs (the "cost

*References to "Appendix" are to the appendix to this Brief.

interrogatories"), as well as non-cost information of various kinds including details of the alleged conspiracy and the issue of damages (the "non-cost interrogatories").

On June 23, 1971, RCOA objected generally and specifically to each and every interrogatory. The grounds for objection included Rule 33(c), burden, irrelevancy, prematurity and, finally, a refusal to answer until completion of all other discovery.

On September 3, 1971, CBS filed its first motion for an order compelling RCOA to answer the CBS initial interrogatories and filed supporting affidavits of Richard E. Gilbert and Leo Strauss,* two independent accountants retained by CBS, who had examined RCOA's documents over an extended period of time and who swore that, contrary to RCOA's representation in its objections, the cost information needed by CBS could not be derived by CBS from the RCOA documents.** ***RCOA offered no affidavits which controverted the affidavits submitted by CBS.***

The Court heard lengthy oral argument on CBS's motion in which RCOA again advanced its Rule 33(c) contention and asserted that, contrary to the affidavits of the accountants, the cost information was ascertainable from the documents. After considering the affidavits, arguments and lengthy memoranda submitted by the parties, the Court, on October 22, 1971, entered an order directing RCOA to answer *all* of CBS's initial interrogatories, including those to which RCOA had directed its Rule 33(c) objection (Appendix 1; ¶ 9).

*Gilbert was a member of Lybrand, Ross Bros. & Montgomery, nationally known certified public accountants. Strauss was a partner of Prager and Fenton, experts in record industry accounting.

**RCOA's assertion that CBS's accountants did not specify what documents they had reviewed (Petition, p. 6) is without merit. The accountants had examined all documents produced by RCOA in response to CBS's motion pursuant to Rule 34, Fed. R. Civ. P., which had preceded CBS's initial interrogatories. CBS's motion had required the production of all documents showing RCOA's cost of acquiring records—the same information sought by the cost interrogatories. The failure of these documents to reveal the information sought necessitated the propounding of the interrogatories.

On May 19, 1972, *seven months* after the Court's order, RCOA filed its "answers" to the CBS interrogatories. In direct violation of the District Court's 1971 order, RCOA again responded to the cost interrogatories by seeking refuge in Rule 33(c). Also, RCOA again willfully refused to answer certain non-cost interrogatories until completion of all other discovery.

CBS therefore filed its second motion with respect to the interrogatories in September, 1972. This motion was joined by the defendants in the coordinated *A & M* and *Kinney* actions, which urged that RCOA's failure to answer CBS's interrogatories prejudiced them as much as it did CBS, since RCOA's cost differential theory was the basis of the *A & M* and *Kinney* actions as well.

RCOA responded to CBS's motion by again arguing that it was entitled as a matter of right to use Rule 33(c) as the answer to the cost interrogatories. This was the very argument that the Court had rejected one year before.

Although RCOA was already in violation of the 1971 order, the Court believed it "would have been fully justified . . . in dismissing the action" (6a) because "RCOA had simply ignored the order of October 22, 1971, and offered no excuse for non-compliance" (6a), and "RCOA's unwillingness to answer created grave doubts as to whether RCOA could support at trial . . . contention[s] central to its case on both liability and damages" (7a), the Court again heard oral argument on RCOA's Rule 33(c) contention and again considered lengthy affidavits and memoranda.

Once again CBS maintained that it could not derive the answers from the proffered documents while RCOA insisted that the answers could be obtained by CBS from these records. Since counsel for RCOA represented to the Court that the CBS interrogatories could indeed be answered by RCOA and since CBS maintained that *it* had been unable to derive the answers from these records, on November 17, 1972 the Court, now for the second time, granted CBS's motion to compel answers (Appendix 2).

"For the next year and a half [from November 1, 1972 to April 1974], nothing was done by RCOA to advance its cause" (7a).

D. The A & M Interrogatories

While CBS waited patiently for RCOA to comply with the District Court's November 1972 order, defendants in the *A & M* and *Kinney* actions renewed their efforts to obtain the same type of information sought by CBS, since it was critical to the prosecution and defense of their actions.

In March, 1974, A & M served interrogatories upon RCOA which were substantially similar to the still unanswered CBS cost interrogatories, with one significant exception. While the CBS cost interrogatories covered RCOA's transactions from 1961 through 1969, the A & M interrogatories also asked for cost information regarding RCOA's transactions *after* 1969, as well as prior thereto.* In addition to these cost interrogatories, A & M asked RCOA to identify each occasion on which it asked for a license from certain defendants and the circumstances surrounding the request (Interrogatory 5).

E. The Kinney Interrogatories

Kinney served its cost interrogatories in January, 1973. Kinney's interrogatories were slightly different from those served by CBS and A & M, but were also designed to elicit cost information. Kinney asked RCOA to set forth its annual purchases of records and tapes from the Kinney record companies and alleged "co-conspirators" for the years 1967 through 1973 and also to set forth its per unit costs for records and tapes on the various Kinney labels.

In response, RCOA made the same Rule 33(c) objection which had been twice rejected by the District Court in the *CBS*

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*Initial discovery in the *CBS* action was restricted by agreement of the parties to the period ending December 31, 1969. At RCOA's request, initial discovery in the *A & M* action had been broadened to include later years.

action. In addition, however, apparently realizing that such an objection was directly contrary to the *CBS* orders and a violation of the principal of "coordinated discovery" directed by the Multidistrict Panel, RCOA offered to provide as its answers in the *Kinney* action the "summary" and "analysis" of its records which was allegedly being prepared in compliance with the District Court's November, 1972, order in the *CBS* action.*

Since RCOA's answers to the *CBS* interrogatories would contain much of the information sought by Kinney, and since, under the coordination order, discovery in the *CBS* action was "deemed taken" in the *Kinney* action, Kinney relied on RCOA's offer to supply the *CBS* answers as its answers in *Kinney*. Thus, Kinney, along with CBS and A & M waited for RCOA to complete its answers.

F. RCOA's Inadequate "Answers"

In April, 1974, RCOA finally served answers to the CBS initial interrogatories. These "answers" were completely inadequate and unresponsive. Thus, RCOA had failed to identify the prefixes of the catalog numbers of most of the records which it had purchased, making it impossible to determine its precise cost of acquiring particular records. In addition, RCOA did not provide any answers at all concerning the discounts, rebates, advertising allowances and other considerations which it had received from suppliers on each of the records it had purchased. Nor had RCOA adequately answered the "non-cost" interrogatories.

In May, RCOA served its "answers" to the A & M interrogatories. These answers were even more deficient than those

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*This "summary" and "analysis" was RCOA's cost interrogatory answers in the *CBS* action. In April, 1973 RCOA confirmed that Kinney would receive the *CBS* cost interrogatory answers when Kinney sent an attorney to RCOA's plant to make a general survey of RCOA's records. Kinney's attorney was told by RCOA's counsel that RCOA was doing the work necessary to answer the CBS cost interrogatories and that, when the work was completed, RCOA would give Kinney access to its answers.

in *CBS*. For the period through 1969, RCOA referred the A & M defendants to its inadequate answers in the *CBS* action. For the period after 1969, RCOA did not answer the A & M interrogatories at all. Instead, as it had done in the *Kinney* action a year earlier, RCOA repeated its Rule 33(c) objection, in direct contravention of the District Court's two prior orders in the *CBS* action. In addition, RCOA also contended that (a) the A & M interrogatories were "burdensome, oppressive, harrassing and vexatious," (b) the information could be derived from "sampling techniques," and (c) the requested information was not "directly available"—the very kind of objections which the Court had rejected in the *CBS* action in 1971. Finally, RCOA did not supply any answer whatever to A & M's Interrogatory No. 5.

In the meantime, Kinney's cost interrogatories of January, 1973 remained unanswered. Moreover, RCOA's failure to answer the CBS and A & M interogatories was as prejudicial to Kinney as it was to CBS and A & M. The "summary", and "analysis" in *CBS* for which Kinney had been waiting since April 1973 was completely inadequate. And, as noted above with respect to the A & M interrogatories, RCOA did not serve any answers at all concerning the post-1969 period.

G. The Final Motions to Compel and the District Court's Final Orders

As a result of the complete inadequacy of RCOA's answers, in June and July 1974, the defendants in all three coordinated actions filed motions to dismiss the complaints or, alternatively, to compel further answers to the interrogatories. This was CBS's *third* motion to compel answers to interrogatories which had originally been served more than three years before.

In its motion, CBS pointed out to the District Court RCOA's history of non-compliance with the Court's orders and described in detail the deficiencies of its April, 1974 "answers." In its companion motion, A & M demonstrated that the answers to the A & M cost interrogatories for the years 1961 through 1969 were inadequate for the same reasons described by CBS in its

motion and also pointed out that RCOA's repeated reliance on Rule 33(c) for the years 1969 forward was flatly contrary to the rulings of the District Court in the *CBS* action. The Court had already twice found RCOA's records to be an inadequate source of information for the cost interrogatories. Finally, A & M also informed the Court that RCOA had not answered its non-cost interrogatory at all.

Kinney, joining the motions filed in the *A & M* and *CBS* actions, advised the Court of RCOA's offer to supply the CBS cost interrogatory answers, Kinney's reliance on this offer, the inadequacy of RCOA's answers and RCOA's omission of information for the years after 1969. Kinney also pointed out that the Court's coordination order required that the discovery in *CBS* be "deemed taken" in the *A & M* and *Kinney* actions. As a consequence, Kinney asked that the District Court apply any sanctions against RCOA across the board in all three co-ordinated actions.

The District Court conducted three days of hearings on the motions in July, August and September, 1974. At one of the hearings RCOA's president admitted upon cross-examination that even *he* could not ascertain from the information supplied in the computer printout certain basic RCOA cost information sought by the interrogatories. He testified that it was necessary to have additional information (which only RCOA could obtain) before those cost calculations could be made. This testimony conclusively proved that " 'the burden of deriving or ascertaining the answers was not substantially the same' " for defendants as for RCOA (34a). Since the RCOA records did not contain complete information, it was necessary to obtain supplementary information from RCOA's employees and suppliers. Obviously, these sources were not as available to CBS as they were to RCOA.

Thus, on November 1, 1974, the District Court granted the motions to compel in all three coordinated cases and ordered RCOA to provide further answers to the interrogatories, within 30 days in the *CBS* action (Appendix 4), and within 60 days in the *A & M* and *Kinney* actions (Appendix 5). Defendants' motions to dismiss were denied without prejudice to renewal should RCOA not satisfactorily answer.

On December 10, 1974, RCOA filed its further "answers" to the CBS interrogatories. In response to the cost interrogatories, these "answers" referred to a ten volume computer printout which had been lodged with the clerk of the District Court on December 6, 1974, but which RCOA had not served on CBS, in violation of Rule 33(a) of the Federal Rules of Civil Procedure. Although on December 10, 1974, the Court subsequently ordered that RCOA serve this printout on CBS (Appendix 6), RCOA, in violation of that order, never served it. (9a).

CBS examined the computer printout on file with the clerk. The examination revealed that these answers to the cost interrogatories were on their face incomplete, inaccurate and unresponsive. For example, RCOA had noted in handwriting many keypunch errors on the printout, which errors it did not bother to correct. CBS estimated that one-third of one volume examined appeared to consist of uncorrected keypunch errors which made the attempted answers meaningless. The answers to the non-cost interrogatories contained in the December 10 document were mere reiterations of prior answers which the Court had previously found unacceptable.

RCOA was even more disdainful of the order in the *A & M* action. It simply ignored the November 1 order *in toto* and filed no supplemental answers whatever. This disregard of the Court's order was not restricted to those interrogatories to which RCOA had directed its alleged Rule 33(c) argument; it failed fully to answer A & M's non-cost interrogatory as well.

RCOA also violated the order in the *Kinney* action. It served a few pages of incomplete, unsigned and unverified answers to only part of the interrogatories it had been directed to answer. These "answers" were preceded by the admission that they were incomplete. In addition, these answers incorporated by reference the inadequate answers filed in the *CBS* action. Finally, as in the *A & M* action, RCOA did not comply with that part of the Court's order which directed it to supply complete answers for the post-1969 period.

H. The District Court's Dismissal

In January 1975, defendants in all three cases renewed their motions to dismiss the complaints on the ground that RCOA had failed to comply with the Court's discovery orders. (This was CBS's *fourth* motion with respect to these interrogatories.) After due consideration, the District Court, on May 20, 1975, granted defendants' motions, and, in a single order and memorandum decision (1a-18a), dismissed all three actions with prejudice under Rule 37(b)(2)(C). Thereafter, the Court also denied RCOA's motion to alter, amend or vacate the judgment.

Contrary to RCOA's suggestion that on these final motions the District Court abruptly dismissed the complaints without considering RCOA's arguments, the Court deliberated on the motions for four months before rendering its decision. In reaching its result, the Court considered five affidavits which pointed out each of the deficiencies in the answers, four affidavits in opposition to the motions, as well as the interrogatories and the answers. In addition, the District Court was intimately familiar with the entire record in these actions.

In dismissing the actions, the Court found:

> "that defendants' interrogatories are relevant, if not central, to RCOA's claims of liability and damages; that to the extent RCOA has answered at all, the answers provided by RCOA are inadequate and unresponsive; that there exists no valid excuse, in a case pending almost seven years, for RCOA's continued failure, over a period of almost four years, to answer fully and completely, that RCOA has wilfully disobeyed the orders of the Court requiring answers; and that dismissal of this seven-year-old litigation is not only justified, but compelled under the circumstances" (11a).

The Court noted that it had "given every conceivable latitude to RCOA in an effort to defer and ultimately avoid the sanction of dismissal" and that "RCOA had been repeatedly warned that its continued refusal to comply with the Court's orders would inevitably lead to dismissal" (3a). Yet the RCOA answers were "inadequate and unresponsive" (11a).

The Court further found that:

> "The burdens imposed upon the defendants' resources during the intervening years, the repeated hearings before the Court, the continued arguments over substantially the same or similar issues in discovery, the repeated assurances of future compliance, followed by continued failure or refusal to comply, the continued use or misuse of judicial time and resources and the undesirable congestion of court calendars and dockets compel the conclusion here reached" (13a).

The Court of Appeals, quoting extensively with approval from the District Court's opinion, unanimously affirmed the District Court's decision and held that the dismissal of these actions was fully supported by the record.

ARGUMENT

There is no reason for granting certiorari here. These cases involve the application of well-established and routine discovery rules to unique facts. They do not give rise to any important unsettled questions of federal law. The District Court, in its discretion, dismissed because of RCOA's contumacious disregard of a number of court orders over a period of years. The Court of Appeals, in strict compliance with this Court's decision in the *National Hockey League* case, *supra*, found that the record supported the District Court's order and that there was no abuse of discretion.

These cases do not give rise to any unsettled general questions regarding the interpretation of Rule 33(c); there are no decisions in conflict on the issues raised by these cases; no congressional purpose is frustrated by the decisions here which merely require a litigant to comply with the rules and court orders; and, finally, after four years of hearings and arguments, due process certainly was not violated.

I.

RCOA's RULE 33(c) ARGUMENT IS UNSUPPORTED BY THE RECORD.

In 1971, RCOA, objecting to the CBS interrogatories, claimed that the answers thereto could be derived from RCOA's documents. The Court heard argument on this issue and considered all of the affidavits and memoranda submitted before ordering RCOA to answer. The fact that the Court made no formal findings in issuing its order is irrelevant. Such findings are not required by Rule 33(c) or any other rule. The District Court considered evidence on the issues of whether or not the RCOA documents in fact contained the information sought and whether or not the burden of obtaining it was equal between the parties and ruled against RCOA (5a-7a). The Court of Appeals, in reviewing the record, found that the evidence supported the District Court's refusal to allow RCOA to utilize Rule 33(c) in the circumstances of these cases (33a-38a).*

In 1972, when RCOA again sought refuge in Rule 33(c) *in regard to the same interrogatories,* the Court again consid-

*RCOA's suggestion that it is the type of party which Rule 33(c) was designed to protect (Petition, p. 10) erroneously implies that RCOA had limited resources at the time the Court ordered it to answer the interrogatories. This is not the case. As pointed out at page 4, supra, RCOA was enjoying spectacular growth at this time.

Both the District Court and the Court of Appeals considered and rejected RCOA's belated argument that its poor financial condition excused it from complying with the Court's orders. The District Court said:

> "Were this the first time RCOA's failure had come before the Court, RCOA's financial condition might conceivably have a bearing upon the scope of any order requiring answers. It would not serve, however, to excuse a plaintiff from providing any information at all. However, on this record of repeated disobedience to the Court's orders and prolonged delay in providing any responsive information during a long period involving no financial distress, RCOA's present and most recent financial condition cannot excuse its continuing non-compliance. (15a)

The Court of Appeals expressly affirmed this finding (38a).

ered affidavits. CBS insisted that it could not obtain answers to its interrogatories from the RCOA documents. It pointed out that the documents alone did not supply the information sought and that additional facts known only to RCOA's employees and suppliers were necessary in order to obtain complete answers. Indeed, it had been as a result of CBS's examination of the documents tendered by RCOA in response to CBS's earlier Rule 34 motion, that CBS found it was necessary to propound the cost interrogatories to obtain the required information. Since RCOA kept assuring the Court that, even if CBS could not, RCOA could answer the interrogatories from the proffered documents, the Court, after due consideration of the arguments regarding the sufficiency of the documents offered and the burden of reviewing them, again ordered RCOA to answer.

The fact that RCOA, more than three years after it was first ordered to answer, did not answer the interrogatories from the documents tendered, and that RCOA's own president testified in 1974 that he could not cull the information sought from the computer printout RCOA offered as RCOA's answer, conclusively demonstrated that the documents tendered did not answer the interrogatories. Thus, there is no support in the record for RCOA's Rule 33(c) argument.*

*RCOA now apparently claims that the 1971 Strauss affidavit offered by CBS is "impeached" by what appear to be excerpts from documents, attached as Appendices C and D to the petition, which were not produced in discovery in any of these cases. (RCOA does not challenge the Gilbert affidavit, which, like the Strauss affidavit, also stated that the RCOA documents did not contain the information sought by the interrogatories.) These documents were not presented by RCOA to the courts below. Factual issues not raised below should not be considered by this Court absent compelling circumstances which do not here exist. *Giordenello* v. *United States,* 357 U. S. 480, 488 (1958). *See Delaware & C. R. R.* v. *Koske,* 279 U. S. 7, 10 (1929); *New York Dock Company* v. *Steamship Poznam,* 274 U. S. 117, 123 (1927). In any event, RCOA does not explain how these documents controvert the Strauss affidavit. The CBS interrogatories sought information regarding RCOA's *costs* from 1961 forward. Appendices C and D concern RCOA's *sales* from October, 1972, to September, 1973. This irrelevant evidence produced at the last moment should be ignored by this Court.

RCOA's petition asks this Court to review the evidence *de novo* and to substitute its judgment as to whether or not the proffered documents adequately answered the interrogatories for that of the District Court and the Court of Appeals. Such a review would be completely contrary to this Court's holding in the *National Hockey League* case.

RCOA argues that "neither *Kinney* nor *A & M* alleged that the requirements of Rule 33(c) were not met with respect to their cost interrogatories" (Petition, p. 13). This contention is meritless. RCOA answered the A & M and Kinney interrogatories in part by referring defendants in those actions to its interrogatory answers in the *CBS* action. The Court had before it voluminous evidence in the coordinated *CBS* action that the documents tendered did not contain the information sought. This issue had been argued and reargued repeatedly in the *CBS* action and the Court had ruled that Rule 33(c) was not appropriate in the circumstance of these cases. The *A & M* and *Kinney* actions had been transferred by the Multidistrict Panel for coordinated pretrial discovery in order to avoid wasteful and unnecessary relitigation of this very type of issue. It would have defeated the whole purpose of coordination if the District Court had permitted RCOA to relitigate this issue in the *A & M* and *Kinney* actions.

Finally, RCOA's Rule 33(c) argument is irrelevant. Assuming arguendo and contrary to fact that the District Court *had* ignored RCOA's Rule 33(c) arguments, there is no causal connection between the Court's rulings on Rule 33(c) and the dismissal, for RCOA had assured the Court for three years that it could and would answer the interrogatories. RCOA had over three years to supply answers from the time the Court first rejected RCOA's Rule 33(c) argument. It is not as if RCOA stood on Rule 33(c) in 1971, took a dismissal on that basis and then appealed. It said it would comply, it delayed the case for three years during that time, and, finally, it still failed to answer the interrogatories. Such a record does not justify any decision by the Supreme Court regarding the interpretation and requirements of Rule 33(c).

RCOA's Rule 33(c) argument is also irrelevant for another reason. RCOA failed to answer some interrogatories to which the Rule 33(c) argument does not apply at all.* The Court dismissed the cases for RCOA's disregard of orders to answer these interrogatories as well. Certiorari based on RCOA's Rule 33(c) argument will not dispose of RCOA's failure to answer these interrogatories.

II.

THERE IS NO CONFLICT IN THE CIRCUITS WHICH REQUIRES REVIEW BY THE SUPREME COURT.

As the Court of Appeals for the Third Circuit pointed out in its decision below (34a), *Daiflon, Inc.* v. *Allied Chemical Corp.*, 534 F. 2d 221 (10th Cir.), *cert. denied*, 45 LW 3275 (October 12, 1976), is "quite different" from these cases. In *Daiflon*, the Court of Appeals for the Tenth Circuit overturned the District Court's dismissal of the complaint for plaintiff's failure to comply with discovery orders. The Court of Appeals held that the District Court should have permitted plaintiff to rely upon Rule 33(c) in response to defendants' interrogatories. Unlike these actions, there was no evidence introduced by the defendants in *Daiflon* which controverted plaintiff's sworn statement that the information sought in defendants' interrogatories was available from plaintiff's books

*Thus, in answering the CBS interrogatories in 1974, RCOA reiterated its answers to the non-cost interrogatories which the Court had found unsatisfactory in 1971 and 1972. For example, in 1972 "as to the damage and conspiracy interrogatories, RCOA refused to answer until completion of discovery . . . a ground RCOA had raised formerly by its objections" (26a) and which the Court had overruled in 1971. Then, in April, 1974, RCOA's answers to the non-cost interrogatories "[f]or the most part . . . directed CBS to documents submitted with previous answers or suggested that the information requested be culled from CBS's own files" (28a). The documents which had been attached to the previous answers had proved on their face not to contain the information. Finally, in December, 1974, RCOA again gave the same answers to the non-cost interrogatories which the Court had rejected in 1972. A summary of the cost and non-cost answers is contained in the Court of Appeals opinion (36a-37a; n. 17). Similarly, RCOA did not fully answer A & M's Interrogatory No. 5.

and records. Further, in contrast to the record here, there was no evidence before the Court in *Daiflon* which would have supported a determination that the burden of ascertaining an answer to the interrogatory in question would be less for plaintiff than for the defendants.

Here, the District Court had before it all of the evidence it needed to decide whether the interrogatories could be answered from the documents specified and the relative burden of answering between the parties. It heard extensive oral arguments, read affidavits and memoranda which were specifically directed to these questions and held an evidentiary hearing. Under these circumstances, the Court of Appeals properly upheld the District Court's determination that the RCOA documents were insufficient and that the burden between the parties was not equal. Thus, the Court of Appeals' holding that the record in *Daiflon Inc.* was "quite different from that in this case" (34a) was absolutely correct.

In contrast to *Daiflon*, the Third Circuit's decision here conforms to this Court's *National Hockey League* ruling which upheld the dismissal of a complaint for plaintiff's failure to comply with discovery orders. Indeed, the facts here are far more egregious than the facts involved in the *National Hockey League* case. There, the District Court had dismissed the complaint after plaintiff had failed to answer interrogatories for 17 months. RCOA failed to answer the CBS interrogatories for a period of over four years and after repeated court orders. It failed to answer some of the A & M and Kinney interrogatories *at all.* RCOA's flagrant bad faith is stamped all over the record. The District Court, finding the answers to crucial interrogatories inadequate for the *fourth* time, and having exhausted all other alternatives, finally dismissed the actions. The Court of Appeals, finding full support for the order of the District Court, unanimously affirmed.

III.

THE DISMISSAL OF THE *KINNEY* ACTION DID NOT VIOLATE RCOA's RIGHT TO DUE PROCESS.

RCOA's final alleged reason why certiorari should be granted solely concerns the *Kinney* action. RCOA contends (Petition,

pp. 16-17) that, although it admittedly did not comply with the District Court's November 1, 1974, order in the *A & M* action, it *did* comply with the Court's companion order in the *Kinney* action and that *Kinney* was only dismissed because the District Court improperly considered RCOA's violations of the orders in the *CBS* action. RCOA asserts that such dismissal was improper "punishment" for its conduct in the coordinated *CBS* action and thus that it was denied "due process." There is no merit to this claim.

First, as noted above, page 13, the *Kinney* action was dismissed because RCOA did *not* comply with the District Court's November 1, 1974 order in the *Kinney* action. As the District Court and the Court of Appeals noted, RCOA's answers to the Kinney interrogatories were "inadequate on their face" (10a) and not in "substantial compliance" (58a). For the pre-1969 period, RCOA had incorporated by reference the answers to the CBS interrogatories which the Court had found to be completely deficient. For the post-1969 period, it did not supply the required information. These violations of the November 1 order alone justified dismissal of the *Kinney* action.

Second, the District Court's consideration of RCOA's continued failure to comply with discovery orders in the coordinated actions in deciding upon an appropriate sanction in *Kinney* did not deprive RCOA of "due process." To the contrary, such consideration was a sound exercise of discretion necessary to the fulfillment of the purpose of coordination. As the Court of Appeals stated (58a):

> "Since *A & M* and *Kinney* had to rely on the answers to these CBS interrogatories in the cases against them and the answers made by RCOA to the similar *A & M* and *Kinney* interrogatories were, in large part, the same as those made to CBS, we deem justified the District Court's reliance on RCOA's disobedience of those orders in directing dismissal in the *A & M* and *Kinney* actions."

The record in the *Kinney* action amply supports the Court of Appeals' holding.

From the outset of the *Kinney* action, RCOA was aware that Kinney's defense of this action would require the same inquiry

into RCOA's cost of acquiring records and tapes made in the *CBS* and *A & M* actions. The purpose of Multidistrict's Panel's transfer of the *Kinney* action to the Eastern District of Pennsylvania was to permit common discovery on this issue (342 F. Supp. 1177-78).

As early as November, 1972, Kinney made it clear to RCOA that it was depending on the answers to the CBS cost interrogatories when it joined CBS's second motion to compel, pointing out that RCOA's failure to answer CBS's cost interrogatories was equally prejudicial to Kinney.*

Moreover, RCOA recognized that Kinney sought the CBS interrogatory answers and, in March, 1973, promised to supply these answers in the *Kinney* action.

In April, 1973, at RCOA's request, the District Court entered an order expressly providing for coordination of the discovery in all three coordinated cases (Appendix 3). The Court's order provided that all discovery taken or produced in the *CBS* action would be "deemed to be taken or produced" in the *A & M* and *Kinney* actions as well, thus entitling Kinney to rely on the RCOA answers to the CBS interrogatories and to be a beneficiary of the discovery orders in *CBS*. As the Court of Appeals stated in its opinion:

> ". . . [The] coordination order was intended to make all prior and future discovery orders in the CBS case, unless otherwise necessary, applicable to the A & M and Kinney

*In its motion, Kinney asserted:

> "The Interrogatories which plaintiff has refused to answer concern the fundamental issues not only in the *CBS* and *A & M* cases but in the *Kinney* case as well, namely, cost, conspiracy and damages. As the Multidistrict Panel recognized in its two orders transferring the *A & M* case and the *Kinney* case to this Court, plaintiff's grievance in all three cases is the same. . . . In these coordinated pretrial proceedings, plaintiff's violation of this Court's October 22, 1971 order and its refusal to adequately answer these key CBS interrogatories under oath prejudices Elektra, Kinney and WEA just as much as if these interrogatories had been formally filed by Elektra, Kinney and WEA in the *A & M* and *Kinney* actions."

> actions. It is highly illogical to assume that a legal ruling judging the adequacy of answers to certain interrogatories, which are deemed available to all parties in the CBS, A & M and Kinney actions, and orders compelling further answers to those interrogatories, should not apply equally to all of the parties [footnote omitted] (57a)."

In July, 1974 Kinney moved to dismiss the *Kinney* action after the answers prepared by RCOA in the *CBS* action were served and proved to be completely inadequate as answers in *CBS*, or as answers in *Kinney*. In November, 1974, the Court ordered further answers to Kinney's interrogatories within 60 days (Appendix 5).

In January, 1975, after the initial deadline set by the District Court, RCOA served admittedly incomplete answers to the Kinney interrogatories. It prefaced its answers by stating: "Plaintiff is unable at this time to supplement fully the indicated interrogatories. . . ." And, most important, it again offered to supply the totally deficient CBS interrogatory answers, including a "computer price study", as its responses in the *Kinney* action.

CBS demonstrated, and the District Court found, that RCOA's answers, including the "computer price study" were on their face incomplete, inaccurate and unresponsive. Accordingly, RCOA, by violating the orders in the *CBS* action, had violated the *Kinney* order as well and the District Court properly dismissed the *Kinney* complaint.

The cases cited by RCOA in the petition (pp. 16-17) are inapposite. *Southern Railway Co.* v. *Templar*, 463 F. 2d 967 (10th Cir. 1972) held that one party in a coordinated case may not be penalized for violating an order entered against another party. Here, the District Court fashioned sanctions against RCOA in *Kinney*, not for the default of some other party, but because of RCOA's own violations of discovery orders entered against it in each of the coordinated actions, including the *Kinney* action itself.*

* *In re U. S. Financial Litigation*, 64 F. R. D. 76 (S. D. Cal. 1974) simply stands for the proposition that an SEC proceeding may be consolidated or coordinated with related private actions. It is irrelevant to the issue here.

The District Court did not punish RCOA for "general misbehavior," the ruling which was set aside in *Dorsey* v. *Academy Moving & Storage, Inc.*, 423 F. 2d 858, 860-61 (5th Cir. 1970); *See also Mitchell* v. *Johnson*, 274 F. 2d 394 (5th Cir. 1960). The complaints here were dismissed because of RCOA's deliberate and specific failure to comply with the District Court's orders in all three of the coordinated actions.

In sum, the ruling below dismissing the *Kinney* action was fully supported by the record, was a proper exercise of discretion and does not raise any issue of "due process" warranting review by this Court.

CONCLUSION

For all the foregoing reasons, the petition for certiorari should be denied.

Respectfully submitted,

Of Counsel:

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Dated: November 17, 1976

Appendix 1

Order of October 22, 1971

IN THE
UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF PENNSYLVANIA

CIVIL ACTION NO. 68-1132, 71-220

RECORD CLUB OF AMERICA, INC.

v.

COLUMBIA BROADCASTING SYSTEM, INC. ET AL.

MDL DOCKET NO. 59

IN RE:
CBS LICENSING ANTITRUST LITIGATION

ORDER

TROUTMAN, *J.*

AND NOW, this 22nd day of October, 1971, oral argument of various motions in the following sequence having been heard, IT IS ORDERED:

1. That motion of Columbia Broadcasting System, Inc. to compel plaintiff to produce Mark Lewis for his oral deposition is GRANTED;

2. That plaintiff's motion to compel Columbia Broadcasting System, Inc. to produce documents is GRANTED; IT IS FURTHER ORDERED that said documents shall be produced only upon the completion of the deposition of Mark Lewis (paragraph 1, supra) and upon the completion of the deposition of Sigmund W. Friedman (paragraph 5, infra) and shall be used in strict compliance with the stipulation and order of confidentiality heretofore entered in this case on February 12, 1969; IT IS FURTHER ORDERED that plaintiff's motion seeking payment of reasonable expenses and counsel fees is DENIED;

Appendix 1

Order of October 22, 1971

3. That plaintiff's motion for modification of said stipulation and order of confidentiality for the purpose of communicating with the Federal Trade Commission is DENIED;

4. That plaintiff's motion to compel answer to interrogatories is, as to Interrogatories Nos. 23E, 23F and 26, GRANTED, and is otherwise DENIED;

5. That motion of Columbia Broadcasting System, Inc. to compel Sigmund W. Friedman to answer certain questions is, as to those questions relating to the use of confidential documents by the witness (page 4 et seq. of said motion), GRANTED; and is otherwise DENIED;

6. That plaintiff's motion for modification of said stipulation and order of confidentiality to use, in a separate proceeding, fourteen license agreements heretofore produced, is DENIED;

7. That, except as to those interrogatories relating to tapes prior to August 1969, plaintiff's motion to compel Columbia Broadcasting Company to answer interrogatories is GRANTED and objections filed thereto by Columbia Broadcasting System, Inc. are DENIED;

8. That motion of Columbia Broadcasting Company to compel the production by the plaintiff of certain documents therein detailed is GRANTED;

9. That motion of Columbia Broadcasting System, Inc. to compel plaintiff to answer initial interrogatories is GRANTED;

10. That motion of Columbia Broadcasting System, Inc. to compel plaintiff to designate and identify all documents being withheld on the ground of privilege is GRANTED.

BY THE COURT,

E. MAC TROUTMAN
J.

Appendix 2

Order of November 17, 1972

IN THE

UNITED STATES DISTRICT COURT

FOR THE EASTERN DISTRICT OF PENNSYLVANIA

MDL DOCKET NO. 59

IN RE:

CBS LICENSING ANTITRUST LITIGATION

CIVIL ACTION NO. 68-11

RECORD CLUB OF AMERICA, INC.

v.

COLUMBIA BROADCASTING SYSTEM, INC., ET AL.

TRANSCRIPT OF ORAL ORDER OF THE DISTRICT COURT ON NOVEMBER 17, 1972

"No. 3, motion of the Defendant CBS to compel the Plaintiff RCOA to submit further answers to interrogatories. This motion is granted at the cost and expense of the Plaintiff RCOA. As to any answers which have already been completed without reference to Rule 33(c) and as to which the Plaintiff contends it has submitted all information presently available, there is a continuing obligation to further answer such interrogatory as such information becomes available" (page 929 of the Joint Appendix filed with the Court of Appeals for the Third Circuit).

"Motion No. 4, which is CBS' motion to dismiss, is denied, without prejudice to its renewal in the event of non-compliance with the order heretofore entered (page 930 of the Joint Appendix filed with the Court of Appeals for the Third Circuit).

Appendix 3.
Order of April 11, 1973

IN THE
UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF PENNSYLVANIA

MDL No. 59

IN RE:
CBS LICENSING ANTITRUST LITIGATION

CIVIL ACTION No. 68-2232

RECORD CLUB OF AMERICA, INC.
v.
COLUMBIA BROADCASTING SYSTEM, INC. ET AL

70 CIV. 2320 (S. D. N. Y.)

RECORD CLUB OF AMERICA, INC.
v.
A & M RECORDS, ET AL.

71 CIV. 5096 (S. D. N. Y.)

RECORD CLUB OF AMERICA, INC.
v.
KINNEY SERVICES, INC. ET AL.

ORDER

TROUTMAN, *J.*

IT IS HEREBY ORDERED:

(1) That all testimony, documents, or other information (hereinafter "discovery") taken or produced in any action now

coordinated for pre-trial proceedings before the United States District Court for the Eastern District of Pennsylvania under the style "CBS licensing antitrust litigation (MDL No. 59)" (hereinafter "coordinated actions") shall be deemed taken or produced in each such action, subject to the provisions of this stipulation, provided that nothing herein shall be deemed to preclude any party from taking whatever discovery it deems necessary for the preparation or trial of any of these coordinated actions;

(2) That all discovery denominated as confidential (hereinafter "confidential discovery") heretofore or hereinafter taken or produced by any party hereto shall be disclosed only to counsel for the parties to any coordinated action, and to such other persons, including principals, officers, agents, servants and independent consultants of the parties, with whom counsel for such party deems it necessary to consult in order to prepare or try any of these coordinated actions;

(3) That no person obtaining access to any confidential discovery shall make copies, reveal, disseminate or use the contents thereof for any purpose other than the preparation or trial of these coordinated actions;

(4) That any confidential discovery filed with the Court prior to trial of any coordinated action shall be kept *in camera*, but may be examined by counsel to any of the parties to any coordinated action;

(5) That promptly after the conclusion of each round of discovery in these coordinated actions, each of the parties will disclose in writing to all parties hereto, the name and business address of each individual other than counsel for the parties to any coordinated action who has obtained access to any confidential discovery;

Appendix 3
Order of April 11, 1973

(6) That the obligations of confidentiality contained herein shall continue until the conclusion of pre-trial proceedings in the coordinated actions;

(7) That prior to disclosing to any person any confidential discovery, counsel making such disclosure shall deliver to such person a copy of this order and such person shall sign a copy of this order and deliver it to such counsel agreeing to be bound by the provisions hereof and counsel shall inform such person that violation of the provisions hereof shall be subject to sanctions of the Court;

(8) That no party shall object to discovery on the ground of confidentiality;

(9) That this order shall supersede all prior confidential stipulations and orders entered in any of the coordinated actions.

E. MAC TROUTMAN
J.

Signed this 11th day of April, 1973.

Read and agreed to this
day of , 1974

.....

Appendix 4
Order of November 1, 1974 (*CBS* action)

IN THE
UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF PENNSYLVANIA

MDL DOCKET NO. 59

IN RE:
CBS LICENSING ANTITRUST LITIGATION

CIVIL ACTION NO. 68-11

RECORD CLUB OF AMERICA, INC.
v.
COLUMBIA BROADCASTING SYSTEM, INC. ET AL.

ORDER

TROUTMAN, *J.*

AND NOW, this 1st day of November, 1974, upon consideration of the memoranda, testimony and arguments made by counsel, IT IS ORDERED that the motions of defendant Columbia Broadcasting Systems, Inc. and the motions of the Warner defendants

(1) for an order compelling plaintiff Record Club of America, Inc., to make further answers to interrogatories 1 and 2 (i-xi) as to include prefix numbers as a part of the catalogue number is GRANTED;

(2) for an order compelling plaintiff RCOA to make further answers to interrogatories 1(iv), 1(xiv), 1(xxi), 1(xxii), 2(viii), 2(ix), 2(x), 2(xi), 4(viii), 4(ix), 4(xii), 4(xiii), 4(xiv), 4(xvi), 4(xix), 4(xxii), 4(xxiii), 4(xxiv), 5, 6, 23(v) and 24 is GRANTED and is otherwise DENIED.

Appendix 4

Order of November 1, 1974 (CBS action)

Said answers shall be filed within thirty (30) days from the date of this order and, accordingly, IT IS FURTHER ORDERED that

(1) defendants' motions to dismiss this action or for an order precluding certain evidence at trial is DENIED without prejudice to its renewal in the event that supplemental answers are not filed within thirty (30) days from the date of this order;

(2) defendants' motion for an award of costs is DENIED without prejudice to its renewal in the event supplemental answers are not filed within thirty (30) days from the date of this order; and

(3) defendants' motion for an order continuing the stay of discovery in this action is GRANTED and said stay will remain in effect pending compliance with this order until otherwise ordered by the Court.

E. MAC TROUTMAN
J.

Appendix 5
Order of November 1, 1974
(*A & M* and *Kinney* actions)

IN THE

UNITED STATES DISTRICT COURT

FOR THE EASTERN DISTRICT OF PENNSYLVANIA

MDL DOCKET NO. 59

IN RE:

CBS LICENSING ANTITRUST LITIGATION

CIVIL ACTION NO. 70-2320 (S. D. N. Y.)

RECORD CLUB OF AMERICA, INC.
v.
A & M RECORDS, ET AL.

CIVIL ACTION NO. 70-5096 (S. D. N. Y.)

RECORD CLUB OF AMERICA, INC.
v.
KINNEY SERVICES, INC. and WARNER-ELEKTRA-ATLANTIC DISTRIBUTING CORP.

ORDER

TROUTMAN, *J.*

AND NOW, this 1st day of November, 1974, upon consideration of the memoranda submitted in connection herewith, IT IS ORDERED that the motion of defendant A & M Records et al.

(1) for an order compelling plaintiff RCOA, Inc. to make further answers to interrogatories 1, 2, 3, 4 is GRANTED;

(2) for an order compelling plaintiff RCOA to make further answers to interrogatory 5 with respect to entities named in interrogatories 1(vii) and 2(v), 2(vi), 2(viii) and 2(ix) and with respect to the period 1970-1973 is GRANTED and otherwise DENIED.

Appendix 5

Order of November 1, 1974 (A & M and Kinney actions)

IT IS FURTHER ORDERED that the motion of defendant Kinney Services, Inc. and Warner-Elektra-Atlantic Distributing Corp. to compel further answers, and to include the period 1970-1973, to its interrogatories 16(g), 16(i) and 35(d) is GRANTED.

Said answers shall be filed within sixty (60) days from the date of this order, and IT IS FURTHER ORDERED that:

(1) defendants' motions to dismiss this action or for an order precluding certain evidence at trial are DENIED without prejudice to their renewal in the event that supplemental answers are not filed within sixty (60) days from the date of this order;

(2) defendants' motions for an award of costs are DENIED without prejudice to their renewal in the event supplemental answers are not filed within sixty (60) days from the date of this order;

(3) defendants' motion for an order staying further discovery is DENIED.

E. MAC TROUTMAN
J.

Appendix 6

Order of December 30, 1974

IN THE

UNITED STATES DISTRICT COURT

FOR THE EASTERN DISTRICT OF PENNSYLVANIA

MDL DOCKET NO. 59

IN RE:

CBS LICENSING ANTITRUST LITIGATION

CIVIL ACTION NO. 68-1132

RECORD CLUB OF AMERICA, INC.

v.

COLUMBIA BROADCASTING SYSTEM, INC. ET AL.

ORDER

TROUTMAN, *J.*

AND NOW, this 30th day of December, 1974, upon consideration of the mandatory language of FRPC #33, IT IS ORDERED that the plaintiff shall furnish defendants with copies of answers to interrogatories filed on December 6, 1974.

E. MAC TROUTMAN
J.

FILED

Jan. 5

JOHN J. HARDING, CLERK

By .....DEP. CLERK

IN THE

Supreme Court of the United States

October Term, 1976

No. 76-543

IN RE: CBS LICENSING ANTITRUST LITIGATION

RECORD CLUB OF AMERICA, INC.,
Petitioner,

vs.

COLUMBIA BROADCASTING SYSTEM, INC., ET AL.,
Respondents.

RECORD CLUB OF AMERICA, INC.,
Petitioner,

vs.

A & M RECORDS, ET AL.,
Respondents.

RECORD CLUB OF AMERICA, INC.,
Petitioner,

vs.

KINNEY SERVICES, INC., ET AL.,
Respondents.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

PETITIONER'S REPLY BRIEF

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IN THE

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October Term, 1976

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IN RE: CBS LICENSING ANTITRUST LITIGATION

RECORD CLUB OF AMERICA, INC.,

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vs.

COLUMBIA BROADCASTING SYSTEM, INC., et al.,

Respondents.

RECORD CLUB OF AMERICA, INC.,

Petitioner,

vs.

A & M RECORDS, et al.,

Respondents.

RECORD CLUB OF AMERICA, INC.,

Petitioner,

vs.

KINNEY SERVICES, INC., et al.,

Respondents.

ON PETITION FOR A WRIT OF CERTIORARI TO THE
UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

PETITIONER'S REPLY BRIEF

The purpose of this reply brief is to help clear up the smoke screen created by the defendants' highly-skilled legion of lawyers through innuendo and misstatements. Rather than succumbing to the temptation to correct every

such misstatement and innuendo, RCOA will confine itself to correcting only those that are most egregious, on matters central to the issues before this Court.

I.

The Court of Appeals Decision is in Direct Conflict with Daiflon and the Intended Purpose of Rule 33(c).

As pointed out in RCOA's Petition, the Court of Appeals decision is in direct conflict with the Tenth Circuit decision in *Daiflon, Inc.* v. *Allied Chemical Corp.*, 534 F. 2d 221 (1976), a case directly on point and identical to these cases in every material respect—even though the Court of Appeals for the Third Circuit, in its opinion below, ignored *Daiflon*, mentioning it only in one sentence (at the end of a seemingly unrelated footnote), and saying only that, in that Court's view, *Daiflon's* record "is quite different from that in this case" (P. 34a)[1].

In other words, the Court of Appeals never showed any way in which *Daiflon* was different and the defendants' attempts to distinguish that case (R.B. 19-20)[2] are unsupported by the facts. As in *Daiflon*, there was no evidence introduced by the defendants which controverted plaintiff's evidence that the information sought was available from plaintiff's books and records. Furthermore, as in *Daiflon*, there was no evidence before the Court which would have supported a determination that the burden of ascertaining the information would not have been substantially the same for defendants as for plaintiff—and Rule 33(c) reads "substantially the same," not "substantially less" as implied by defendants (R.B. 20).

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[1] References preceded by "P." are to pages of the Petition.

[2] References preceded by "R.B." are to pages of the Respondents' Brief in Opposition.

True, CBS did introduce affidavits (which predated RCOA's Rule 33(c) election and Mr. Lewis' affidavit), stating that, from the (unspecified) RCOA *documents they had reviewed*, it was not possible to calculate the cost of records, tapes and merchandise to RCOA. However, even though these affidavits were erroneously assumed to have meant that it was not possible to calculate such cost from RCOA's books and records,[3] these affidavits do not actually controvert Mr. Lewis' affidavit, which states that such information could be calculated from the RCOA documents specified in that affidavit. CBS, by the way, never introduced any evidence indicating that Messrs. Gilbert and Strauss had ever seen the documents specified in Mr. Lewis' affidavit. In fact, two CBS hired accountants, Joseph Saunders and William Woodson (and a CBS accounting team), had seen the documents specified in Mr. Lewis' affidavit (before Messrs. Gilbert and Strauss visited RCOA), but, "mysteriously", neither Mr. Saunders nor Mr. Woodson submitted an affidavit indicating that it was not possible to calculate such information from the RCOA documents they had seen.

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[3] If the Gilbert and Strauss affidavits are interpreted as standing for the proposition that the cost interrogatories could not be answered from RCOA's books and records, their affidavits are both impeached by Appendices C and D to the Petition, which Appendices consist of documents prepared by Mr. Strauss. Those documents, which were not presented earlier only because they were just recently obtained by RCOA (RCOA's President having never had access to them until late August of 1976), *deal with RCOA's costs*, as well as its sales, despite the defendants' representation to the contrary (R.B. 17, footnote). For example, Schedule 6 to Appendix D lists such items as: 'Cost", "Cost of Goods Sold", and "Estimated Cost Per Collated Unit". (Certain other cost-related items are not as obvious.) The fact that the documents deal with a later period than that covered by the CBS cost interrogatories is irrelevant, for the documents nevertheless show that the information can be ascertained from RCOA's books and records. The invoices and vouchers used were not the identical ones from which the earlier cost interrogatories could have been answered, but they were comparable—and Mr. Strauss was able to compile comparable information from them.

In *Daiflon,* the Court found no evidence to support a determination that a substantial difference in the burden of compiling the desired information existed. Here, too, there is no such evidence. The only evidence with respect to comparative burden is Mr. Lewis' above-mentioned affidavit in which he swore that while the burden "would be mammoth, the burden of deriving or ascertaining information would fall substantially the same on CBS, which has sought the information and which would be the beneficiary thereof, as it would upon RCOA." This sworn statement was not challenged by CBS since the Gilbert and Strauss affidavits, the only evidence introduced by CBS on Rule 33(c) standards, do not mention the relative burden between CBS and RCOA of compiling data. (In its memorandum of law to the District Court, CBS's counsel argued the burden would be greater to CBS than on RCOA, but presented no evidence to support the argument.)[4]

Actually, in a sense, the relative burden was anything but equal—it was much heavier on RCOA than it would have been on CBS. At the very height of its success, RCOA had a tangible net worth of one million dollars. (Thus, it was always a small company compared with its competitors: CBS, which, through its Columbia House division, now has approximately an 80% share of the U.S. record club market; Westinghouse Electric Corp.; and RCA Corporation.) As a direct result of the District Court's refusal to permit RCOA to exercise its option

[4] The District Court made no mention of the comparative burden —or of Rule 33(c). The Court of Appeals, hopelessly confused as to which documents RCOA specified as those containing the information requested in the cost interrogatories, only said the burden was not substantially the same "if the print-outs were to be the sole business records supplied to defendants" (P. 34a). The *business records specified* by RCOA consisted of invoice and voucher records; they *did not include any print-outs,* even though the defendants have attempted to spread the Court of Appeals' confusion to this Court (R.B. 13 and 17).

under Rule 33(c), RCOA spent more than $100,000 (exclusive of legal fees and expenses), an amount equal to approximately 10% of its tangible net worth, in responding to the cost interrogatories. Such expenditure was an unconscionable burden on RCOA, which is now in Chapter XI. On the other hand, to CBS and the other defendants, which have multi-billion dollar sales and a combined net worth approximating a billion dollars, the expenditure of $100,000 would have merely been another drop in the bucket. Actually, RCOA's expenditure of $100,000 was comparable to the defendants' expenditure of one hundred million dollars.

To accuse RCOA of "flagrant bad faith" (R.B. 20) when RCOA was unconscionably forced to incur expenses equal to 10% of its tangible net worth as part of a discovery exercise is part of the defendants' continuing effort, evident throughout these proceedings, to paint RCOA as a villain in order to distract the Courts' attention from the underlying issues and to prejudice the Courts in the defendants' favor.

In any event, RCOA met the requirements of Rule 33(c), the record could not support a finding that either condition of Rule 33(c) was not met, there was no finding that either condition was not met, and, as in *Daiflon,* the District Court erred in refusing to permit the plaintiff to rely on Rule 33(c).

Actually, in attempting to analogize this case to *National Hockey League* v. *Metropolitan Hockey Club, Inc.,* 96 S. Ct. 2778 (1976), the defendants (and the Courts below) "overlooked" one of the main issues in this case—Rule 33(c). In *National Hockey League* the complaint was dismissed because the plaintiff therein had *failed to substantially answer crucial interrogatories.* In this case, however, *RCOA did answer the interrogatories by invoking* the business records option available to it under the then new *Rule 33(c).*

Although the District Court characterized RCOA's election of such option as tantamount to no answer at all and as seeking "to shift the burden" (P. 3a), Rule 33(c), itself, expressly provides that specifying the records from which answers to interrogatories may be derived and affording the interrogator the opportunity to examine and copy such records constitutes "*a sufficient answer.*" Thus, RCOA did sufficiently answer the interrogatories.

Even if this Court were to agree with the District Court that the invocation of the business records option under Rule 33(c) is tantamount to no answer at all, however, *National Hockey League* would still be distinguishable from this case because, even forgetting RCOA's "Rule 33(c) answer", the interrogatories here would *not* have been *substantially unanswered*. Quite the contrary, as a result of the District Court's rejection and characterization of RCOA's election of the Rule 33(c) option as no answer, RCOA compiled (at a cost of more than $100,000) and submitted 9,000 pages of computer print-outs setting forth the information requested in the interrogatories!

After that answer was submitted, first CBS complained that certain prefix digits were not included, even though they were irrelevant[5] and even though CBS, a supplier to RCOA, had as much access to such prefix digits as RCOA. Then, after RCOA added the additional, though irrelevant, requested information, CBS, knowing RCOA had just filed in Chapter XI, jumped on RCOA, claiming that much of the information was either omitted or erroneous, and had this case dismissed, without a hearing, on the basis of the alleged, but unproven, errors. Had there been a hearing, RCOA might have had the opportunity not only to show that the error rate was less than 1%, but also to inquire as to why it was "necessary" for RCOA to supply the prefix digits if CBS had such prefix digits so readily available that CBS could support its untested, quickly-made allegation that RCOA had supplied incorrect prefix digits. Perhaps it was only "necessary" because CBS knew RCOA was about to buckle under—after seven years of costly, "gaming" anti-trust litigation.

[5] Both lower Courts mistakenly thought the prefix digits were relevant because they, for some reason, thought the prefix digits were necessary to determine RCOA's cost of acquiring records and tapes (P. 8a, footnote 9, and P. 35a-36a). However, such costs were set forth in the print-outs as originally filed and had nothing to do with the prefix digits.

In any event, since RCOA had sufficiently answered the interrogatories in accordance with Rule 33(c)—and had, in addition, answered by producing a one hundred thousand dollar, 9,000 page compilation of the requested information, a compilation never actually shown to have contained *any* errors—the record in this case could not support a finding that the crucial interrogatories in this case remained substantially unanswered and, therefore, this case is not controlled by *National Hockey League*.

II.

The Kinney Case was Dismissed as Punishment for the CBS Case.

The defendants claim the Kinney Case was dismissed because RCOA did not comply with the District Court's November 1, 1974 order in the Kinney Case (R.B. 21), but they fail to mention that RCOA complied with that order (on time) with respect to Kinney (and although Kinney, knowing RCOA had just filed in Chapter XI, claimed RCOA's response was inadequate, Kinney never offered any proof of such contention). The fact is that, as the language quoted by the defendants (R.B. 21) from the Court

of Appeals decision indicates, the District Court dismissed the Kinney Case as punishment for RCOA's alleged conduct in the CBS Case.

CONCLUSION

For each of the foregoing reasons, and for the reasons set forth in our petition, the petition for certiorari should be granted.

Respectfully submitted,

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